Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

SAN PAOLO U.S. HOLDING COMPANY, INC.,
Petitioner,

vs.

LIONEL SIMON, dba LIBERTY PAPER COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FOUR

PETITION FOR WRIT OF CERTIORARI

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139 pg

QUESTIONS PRESENTED

(i) Whether California's "passion and prejudice" standard violates the requirements of independent review mandated by this Court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

(ii) Whether a defendant's wealth may still be considered in determining whether a punitive damage award is excessive in light of *Cooper Industries, Inc., supra*, and *BMW of North America v. Gore*, 517 U.S. 559 (1996).

(iii) What are the duties of an appellate court when applying an independent, de novo standard of review in assessing the constitutionality of an award of punitive damages?

(iv) Whether an appellate court may limit its review of a punitive damage award to the evidence which is "most supportive of the verdict" and "in the light most favorable to the prevailing party," speculate on the jury's thinking and rely upon "implied factual findings of the jury," or whether it must independently review the entire record in determining whether a punitive damage award is constitutionally excessive.

(v) Whether a ratio of punitive damages to actual or potential harm of 340 to 1 is constitutionally excessive as a matter of law in a business tort lawsuit?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Lionel Simon, doing business as Liberty Paper Company, the Plaintiff in the underlying action, and Defendant San Paolo U.S. Holding Co., Inc., the Petitioner herein. San Paolo U.S. Holding Co., Inc., is a corporation formed and existing under the laws of the State of Delaware, and is a subsidiary of San Paolo IMI S.p.A., a corporation organized under the laws of the Republic of Italy. Also a party to this litigation (but not this Petition) is Defendant San Paolo Bank (formally known as Istituto Bancario San Paolo Di Torino), an affiliate of San Paolo U.S. Holding Co., Inc.

TABLE OF CONTENTS

Page

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION OF THIS COURT 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT 2

A. Factual Background 2

B. Procedural Background and Presentation of the Federal Question 4

REASONS FOR GRANTING THE PETITION 10

A. State Courts Require Guidance Regarding the Application of the De Novo Standard of Review to the Constitutionality of Punitive Damage Awards 10

1. The Mechanics of Appellate Review of Punitive Damage Awards Requires Further Development 16

Page

2. The Court of Appeal's Second Opinion Demonstrates a Conflict Between Federal and State Standards of Reviewing Punitive Damage Awards (and the Need for Clarification as to How These Standards Must Be Applied) 20

B. The Courts Require Guidance as to the Consideration to Be Given to a Defendant's Wealth in Determining the Constitutionality of a Punitive Damage Award 27

CONCLUSION 30

LIST OF APPENDICES

Page

APPENDIX A
Opinion, California Court of Appeal,
Second Appellate District, Division Four,
Dated November 7, 2001 ..... A1

APPENDIX B
Opinion, California Court of Appeal,
Second Appellate District, Division Four,
Dated August 28, 2000 ..... B1

APPENDIX C
Orders, California Supreme Court,
Dated February 20, 2002 and
February 11, 2002 ..... C1

APPENDIX D
Orders, United States Supreme Court,
Dated May 29, 2001 ..... D1

APPENDIX E
Reporter's Transcript for Trial Court
Hearing on Motion for New Trial, or
Alternatively for Remittitur of Excessive
Damages, Dated April 8, 1998 ..... E1

TABLE OF AUTHORITIES

Page

Cases

Ace v. Aetna Life Ins. Co.,
139 F.3d 1241(9th Cir. 1998), *cert. denied*,
525 U.S. 930 26

Adams v. Murakami,
54 Cal.3d 105 (1991) 27

Arnold v. Guideone Specialty Mut. Ins. Co.,
142 F.Supp.2d 1319 (N.D. Ala. 2001) 19

Auerbach v. Great Western Bank,
74 Cal.App.4th 1172 (1999) 26

BMW of North America v. Gore,
517 U.S. 559 (1996) ..... *passim*

Bose Corp. v. Consumers Union of United States, Inc.,
466 U.S. 485 (1984) 15

Campbell v. State Farm Mut. Auto. Ins. Co.,
432 Utah Adv.Rep. 44 (Oct. 10, 2001) 14

Continental Trend Resources, Inc. v. OXY USA, Inc.,
101 F.3d 634 (10th Cir. 1996) 23, 27

Cooper Industries, Inc. v. Leatherman Tool Group, Inc.
532 U.S. 424 (2001) ..... *passim*

Page

Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.,
155 Cal.App.3d 381 (1984) 13, 23

Equal Employment Opportunity Comm'n v. Mid-Continent Security Agency, Inc.,
2001 WL 800089 (N.D. Ill. 2001) 20

FDIC v. Hamilton,
122 F.3d 854 (10th Cir. 1997) 22, 25, 27

Fortman v. Hemco, Inc.,
211 Cal.App.3d 241 (1989) 14

Haynes v. Washington,
373 U.S. 503 (1963) 13

In re the Exxon Valdez,
270 F.3d 1215 (9th Cir. 2001) 16

Lane v. Hughes Aircraft,
22 Cal. 4th 405 (2000), *cert. denied*,
531 U.S. 928 ..... 16, 28

Leatherman Tool Group, Inc. v. Cooper Industries, Inc.,
2002 WL 841188 (9th Cir. 2002) 18, 19, 28

Middlebrooks v. Hillcrest Foods,
256 F.3d 1241 (11th Cir. 2001) 14

Neibel v. Trans World Assurance Co.,
108 F.3d 1123 (9th Cir. 1997) 23

Page

Oberg v. Honda Motor Co., Ltd.,
888 P.2d 8 (Ore. 1995) 27

Ornelas v. United States,
517 U.S. 690 (1996) 13

Owens-Corning Fiberglas Corp. v. Ballard,
739 So.2d 603 (Fla. Ct.App. 1998) 27

Pacific Mutual Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 6, 14, 23, 25, 29

Pivot Point Int'l v. Charlene Prods., Inc.,
932 F. Supp. 220 (N.D. Ill. 1996) 28

Pulla v. Amoco Oil Co.,
72 F.3d 648 (8th Cir. 1995) 22, 25

Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.,
272 F.3d 1335 (Fed. Cir. 2001) 14, 24

Rufo v. Simpson,
86 Cal.App.4th 573 (2001) 26, 27

San Paolo U.S. Holding Company, Inc. v. Simon,
121 S.Ct. 2190 (2001) 1, 10

Seeley v. Seymour,
190 Cal.App.3d 844 (1987) 26

Sierra Club Foundation v. Graham,
72 Cal.App.4th 1135 (1999) 13

Page

Solem v. Helm,
463 U.S. 277 (1983) 12

Stranahan v. Fred Meyer, Inc.,
958 P.2d 854 (Ore. 1998) 28

Stroud v. Lints,
760 N.E.2d 1176 (Ind.Ct.App. 2002) 14

Swinton v. Potomac Corp.,
270 F.3d 794 (9th Cir. 2001) 23

Thompson v. Keohane,
516 U.S. 99 (1995) 15

Time Warner Entertainment Co. v. Six Flags Over Georgia, LLC,
2002 WL 472306 (Ga.App. 2002) 14, 23, 28

TXO Production Corp. v. Alliance Resources Corp.,
509 U.S. 443 (1993) 14, 23, 25, 26, 28

Waddill v. Anchor Hocking, Inc.,
27 P.3d 1092 (Ore. App. 2001) 13, 28

Zazu Designs v. L'Oreal, S.A.,
979 F.2d 499 (7th Cir. 1992) 28

Page

Statutes

28 United States Code Section 1257(a) 2

Constitutions

California Constitution,
article I, Section 7(a) 16

United States Constitution,
Eighth Amendment 2
Fourteenth Amendment, Section 1 2

Secondary Authorities

W. McKechnie, Magna Carta 284 (2d ed. 1914) 12

Mark A. Behrens, Joseph P. MastroSimone and Victory E. Schwartz, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, BROOK. L. REV. (Winter 1999) 29

Other Authorities

S. Rep. No.105-32 (1997) (Senate Commerce Committee Report on Product Liability Reform Act of 1997) 16

PETITION FOR WRIT OF CERTIORARI

San Paolo U.S. Holding Co., Inc. ("San Paolo"), returns to this Court for further relief and respectfully petitions for a Writ of Certiorari to review the decision of the Court of Appeal of California, Second Appellate District, Division Four (the "Court of Appeal").

OPINIONS BELOW

The original decision of the Court of Appeal affirming the judgment of the Superior Court of Los Angeles County. (App., *infra*, B-1-35) is unreported. The Order of this Court granting San Paolo's previous Petition for Writ of Certiorari, vacating the judgment of the Court of Appeal, and remanding the case for consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* ("*Cooper Industries*"), 532 U.S. 424 (2001), is reported as *San Paolo U.S. Holding Company, Inc. v. Simon*, 121 S.Ct. 2190 (2001). (App., *infra*, D-1-2.) The subsequent decision of the Court of Appeal affirming the judgment of the Superior Court of Los Angeles County (App., *infra*, A-1-41) is unreported. The denial of the Petition for Review by the California Supreme Court (App., *infra*, C-1) is unreported.

JURISDICTION OF THIS COURT

On November 7, 2001, the Court of Appeal of California, Second Appellate District, Division Four, filed its unpublished Opinion. On February 11, 2002, the California Supreme Court extended the time for granting or denying San Paolo's Petition for Review to on or before March 15, 2002. On February 20, 2002, the California Supreme Court, *en banc*, issued its Order denying San Paolo's Petition for

Review. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment of the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment, Section 1, of the United States Constitution provides in relevant part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

A. Factual Background

This lawsuit has its genesis in the failed efforts of Lionel Simon dba Liberty Paper Company ("Simon") to purchase a commercial office building (the "Property") from San Paolo U.S. Holding Company, Inc. ("San Paolo"). The Property was first acquired by San Paolo on January 17, 1996, through a foreclosure sale. (Reporter's Transcript ["R.T."], p. 1469, ll. 19-20.[1]) Shortly thereafter, Simon made his first inquiry relating to the purchase of the Property. Throughout the next

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[1] The Joint Appendix in Lieu of Clerk's Transcript and the Reporter's Transcripts referenced herein are part of the record on appeal below.

six months, the parties engaged in three different sets of negotiations relating to Simon's attempts to purchase the Property. Ultimately, those efforts failed, and the Property was sold by San Paolo to a third party for less money in August, 1996. (R.T., p. 1596, ll. 14-21; Joint Appendix in Lieu of Clerk's Transcript ["App."], Vol. III, pp. 1901-1908, 1925.)

In total, Simon engaged in three different unsuccessful sets of negotiations for the purchase of the Property. (R.T., p. 1336, ll. 20-28; p. 1472, l. 24 - p. 1473, l. 3.) Two sets of negotiations occurred in April, 1996. (R.T., p. 1340, ll. 21-26; p. 1473, l. 5 - p. 1474, l. 4.) The third set of negotiations occurred in June, 1996. (App. Vol. VII, pp. 1864 -1871, 1899 - 1900.) The closest that Simon ever came to purchasing the Property was in June 1996, when the parties prepared a written Letter of Intent. (App. Vol. III, pp. 1864 -1871.) Although the Letter of Intent was eventually signed, the transaction ultimately failed, as the parties did not take the following steps contemplated in the Letter of Intent: the execution of a Purchase Agreement/Deposit Receipt and Escrow Instructions, and the opening and closing of escrow.

As the jury recognized, the Letter of Intent clearly provided that it was nonbinding. (R.T., p. 1475, ll. 3-25.) The Letter of Intent contained several conditions which confirmed that it was not a binding agreement, including: (i) approval of San Paolo Bank's Los Angeles and New York offices; (ii) further negotiations between the parties; (iii) preparation of a Purchase Agreement/Deposit Receipt Form (i.e., formal documentation); and (iv) approval by Simon's legal counsel. (App. Vol. VII, pp. 1864 - 1871.)

Immediately after signing the Letter of Intent, Simon and San Paolo continued to negotiate the terms of the proposed sale of the Property. (App. Vol. VII, pp. 1872-1898.) However, the parties still could not reach an agreement on numerous issues. After further unsuccessful negotiations, San

Paolo came to believe that Simon would never purchase the Property. (R.T., p. 1035, l. 28 - p. 1636, l. 12; p. 1637, ll. 16-21; p. 1639, ll. 11-23.) San Paolo therefore canceled the negotiations in writing and sold the Property to a third person for $100,000.00 less than Simon's offer. (App. Vol. VII, pp. 1899-1900; R.T., p. 1569, ll. 14-21.)

B. Procedural Background and Presentation of the Federal Question

On June 21, 1996, Simon filed his Complaint against San Paolo. (App. Vol. I, pp. 1-18.) The Complaint included causes of action for Breach of Contract, Specific Performance, Breach of the Implied Covenant of Good Faith and Fair Dealing, and False Promise, all founded upon an alleged promise by San Paolo to sell the Property to Simon.

On April 30, 1997, the trial court granted San Paolo's Motion for Summary Adjudication of Issues on the causes of action for Specific Performance and Breach of the Implied Covenant of Good Faith and Fair Dealing. (App. Vol. II, p. 585.)[2] This ruling left only two causes of action remaining against San Paolo: for Breach of Contract and for False Promise.

On August 4, 1997, the case went to trial on the remaining causes of action, and the jury returned a verdict in favor of San Paolo on the cause of action for Breach of Contract, finding that neither the Letter of Intent nor any other document constituted a binding, enforceable agreement between the parties. (App. Vol. III, pp. 613-617.) On the remaining cause of action for False Promise, the jury returned

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[2] Co-Defendant San Paolo Bank filed its own Motion for Summary Judgment at this same time. The Motion was granted by the trial court and affirmed on appeal by the California Court of Appeal, 2nd Civil No. B113208 (Opinion filed May 21, 1998).

a verdict in favor of Simon and awarded the sum of $5,000.00 as actual damages. In the punitive damage phase, Simon was awarded the sum of $2,500,000.00. (App. Vol. III, p. 618.)

San Paolo then filed its Motions for (a) Judgment Notwithstanding the Verdict (which the trial court denied); and (b) New Trial or, Alternatively, For Remittitur of Excessive Damages. In these Motions, among other things, San Paolo asserted that the punitive damage award, which was 500 times the award of actual damages, was grossly excessive as a matter of law and violative of San Paolo's due process rights pursuant to this Court's decision in *BMW of North America v. Gore* ("*BMW*"), 517 U.S. 559 (1996) and related authorities. (App. Vol. III, pp. 634-635, 646-647; Vol. IV, pp. 1040-1044.) The trial court ruled that it would grant the Motion for New Trial unless Simon accepted the reduced punitive damage award of $250,000.00. (App. Vol. IV, p. 1050; Vol. V, p. 1228.) Simon rejected the reduced award and elected to proceed with a new trial.

On March 9, 1998, the new trial went forward on the limited issue of the amount of the punitive damages, if any, to be awarded to Simon (the "Second Trial"). At the Second Trial, Simon's counsel improperly argued that the jury could consider harm and damages claimed by Simon which the first jury previously rejected and denied.[3]

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[3] At the First Trial, Simon sought damages for not only the alleged lost value in the Property, but also the consequential damages incurred in retaining an attorney to review the transaction. (R.T. p. 1915, ll. 7-12; p. 1916, ll. 3-6; p. 1927, ll. 15-16.) The first jury specifically awarded Simon nothing for the alleged lost value in the Property, yet Simon still argued to the second jury (over the objection of San Paolo) that his lost value in the Property (i.e., alleged harm) was $400,000.00. The trial court denied the Motion in Limine of San Paolo which requested that Simon be prohibited from introducing evidence on claims and damages which had already been rejected. (App. Vol. V, pp. 1323-1334.)

In addition to the foregoing, Simon's counsel made inflammatory statements to the jury which were inappropriate and designed to raise passion and prejudice, such as the following:

1. San Paolo's conduct was nothing less than attempted murder, assault or battery (akin to "shooting a gun into a crowd"). (R.T., p. 1974, l. 17 - p. 1975, l. 3)
2. The punishment has to fit the "crime." (R.T., p. 1918, l. 3);
3. San Paolo was a "criminal." (R.T., p. 1922, ll. 18-21; R.T., p. 1980, ll. 9-12); and
4. "They didn't think anybody would find out. And there would never be a criminal caught if they were all perfect. And this one wasn't." (R.T., p. 1980, ll. 9-12.)

The second jury returned a verdict in favor of Simon for punitive damages of $1,700,000.00. (App. Vol. VII, pp. 1808-1815.) Thereafter, San Paolo filed a Motion for New Trial, or Alternatively, for Remittitur of Excessive Damages. (App. Vol. VI, pp. 1518-1520; Vol. VII, pp. 2010-2029.) Again, San Paolo posited that the award of punitive damages in an amount 340 times the actual damages awarded was excessive as a matter of law and violative of its federal due process rights. (App. Vol. VI, p. 1519; Vol. VII, pp. 2021-2023.) The trial court denied the Motion.

In its perfunctory treatment of San Paolo's challenge to the excessiveness of the award under the trial standards set forth in *BMW and Pacific Mutual Life Ins. Co. v. Haslip* ("*Haslip*"), 499 U.S. 1 (1991), the trial court found that an award of punitive damages "boils down to about the same sort of analysis that the jury gives to emotional distress damages. It's not done with any particular precision. And the cases have not required that it be done with particular precision. [¶]

I have analyzed it from the standpoint of each of the three tests, and I have concluded that in all the facts in this case and the two trials, the two verdicts and everything that I heard in the case, the Motion is denied." (App., *infra*, E-11; App. Vol. VII, pp. 1826-1828; R.T., p. 1997, l. 12 - p. 1998, l. 12, p. 2001, l. 19 - p. 2002, ll. 1-12.)

Judgment was then entered on April 8, 1998, finding in favor of San Paolo on the claim of Breach of Contract; finding in favor of Simon in the amount of $5,000.00 on the claim of False Promise; and awarding Simon punitive damages of $1,700,000.00. (App. Vol. VII, pp. 1808-1815.)

On or about April 20, 1998, San Paolo filed its Notice of Appeal with regard to the entry of Judgment in favor of Simon on the False Promise cause of action, the amount of the Judgment in favor of Simon, and the rulings upon which the Judgment was based. (App., Vol. VII, pp. 1829-1834.) Respondent Simon then filed a Notice of Cross-Appeal. (App., Vol. VII, pp. 1851-1853.) On appeal, San Paolo contended, among other things, that any injury suffered by Simon was purely economic and that the punitive-to-actual damages ratio of 340 to 1 was constitutionally excessive and disproportionately penalized San Paolo. (Appellant's Opening Brief, pp. 29-34, Appellants' Reply Brief and Cross-Respondent's Brief, pp. 18-21.)

On August 28, 2000, the Court of Appeal of California, Second Appellate District, Division Four (the "Court of Appeal"), filed its first unpublished Opinion in this matter (the "Prior Opinion"), affirming the Judgment in its entirety and rejecting the appeals of San Paolo and Simon. (App., *infra*, B-15 - B-49.) In sustaining the award of punitive damages, the Court of Appeal employed a deferential "substantial evidence" standard of review, which "begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." (App., *infra*,

B-31, B-35- B-36, quoting *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 429 (1935).)

The Court of Appeal prefaced its Opinion with the statement that: "We summarize the evidence in the light most favorable to Simon, as the prevailing party, and we give Simon the benefit of every reasonable inference and resolving conflicts in support of the verdict."[4] (App., *infra*, B-19-B-20.) Throughout its Opinion, the Court of Appeal acknowledged the highly deferential nature of its review and repeatedly refused to engage in an independent, de novo review of the constitutionality of the punitive damages award.

In analyzing the reasonableness of the relationship of the punitive damages awarded and harm actually suffered, the Court of Appeal also posited that it could consider as a factor the $400,000.00 benefit of the bargain damages sought by Simon in his claim for breach of contract, which was expressly rejected by the jury. (App., *infra*, B-30.) The Court concluded that, in this light, the ratio of actual harm to punitive damages was "not 340 to 1, but just over 4 to 1," which was "not grossly disproportionate." (App., *infra*, B-31.) The authorities relied upon by the Court, however, did not involve claims which already had been rejected by the trier of fact.

On September 12, 2000, San Paolo filed its Petition for Rehearing with the Court of Appeal, pointing out several omissions and misstatements of material facts and issues presented on appeal. On September 21, 2000, the Petition for Rehearing was denied. On October 6, 2000, San Paolo filed a Petition for Review with the California Supreme Court, presenting five issues for review relating to the impropriety of the punitive damage award in light of the fact that the conduct

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[4] This same language appears in the Court of Appeal's second Opinion. (App., *infra*, A-7-8.)

involved a single commercial transaction and the harm suffered was purely economic. On November 27, 2000, the California Supreme Court extended the time for granting or denying review in this matter. On December 13, 2000, the California Supreme Court, *en banc*, issued its Order denying San Paolo's Petition for Review.

On March 12, 2001, San Paolo filed a Petition for Writ of Certiorari with this Court.[5] On May 29, 2001, the Court granted San Paolo's Petition for Writ of Certiorari, vacated the judgment of the Court of Appeal, and remanded the case to that court for further consideration in light of this Court's decision in *Cooper Industries*. (App., *infra*, C1- C2.)

At the Court of Appeal's request, the parties filed letter briefs addressing *Cooper Industries* and its impact on the punitive damage award at issue in this case.[6] On October 19, 2001, the Court of Appeal heard oral argument, during which it telegraphed its intention to again affirm the Judgment in its entirety based upon the same reasoning and assumptions as before. During that oral argument, the Court of Appeal openly speculated about the jury's thinking and findings instead of conducting its own independent review. On November 7, 2001, the Court of Appeal filed its second unpublished Opinion (the "Second Opinion"), again affirming the $1.7 million punitive damage award in favor of Simon and denying the Motion for Restitution. In doing so, the

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[5] San Paolo subsequently tendered the entire amount due under the Judgment to Simon. An Acknowledgment of Satisfaction of Judgment in Full was filed on May 29, 2001.

[6] Based upon the substantial similarity between the Prior Opinion and the Second Opinion and the comments of the Court at oral argument, it appears that little regard was given to this briefing. In fact, many of the issues raised by San Paolo in those briefs are either ignored or barely mentioned in the Second Opinion.

Court of Appeal simply reissued its Prior Opinion, inserting a few new paragraphs. (App., *infra*, A1-41.)

On December 17, 2001, San Paolo filed a Petition for Review with the California Supreme Court, presenting seven issues for review relating to the propriety of the punitive damage award. On February 11, 2002, the California Supreme Court extended the time for granting or denying review in this matter. (App., *infra*, C-2.) On February 20, 2002, the California Supreme Court, *en banc*, issued its Order denying San Paolo's Petition for Review.

REASONS FOR GRANTING THE PETITION

A. State Courts Require Guidance Regarding the Application of the De Novo Standard of Review to the Constitutionality of Punitive Damage Awards

This Petition provides this Honorable Court with the opportunity to assure the uniform, meaningful application by courts across this Nation of the new, heightened standard of review recently mandated by this Court when passing on the constitutionality of an award of punitive damages. On May 14, 2001, this Court issued a new standard of appellate review for awards of punitive damages in *Cooper Industries*. The Court further ordered that this new standard be applied to the case at bench. *San Paolo U.S. Holding Company, Inc. v. Simon*, 121 S.Ct. 2190. The courts, however, require guidance regarding the application of this standard.

This case continues to present substantial questions of law of paramount public interest which have not yet been addressed by this Court, including: (i) the duties of an appellate court in applying the new, heightened standard of review to a punitive damage award when challenged as excessive under the Fourteenth Amendment to the United States Constitution; (ii) the conflict between the independent,

de novo standard of review recently articulated by this Court and the deferential passion and prejudice standard still being applied under state law; (iii) whether wealth can continue to be used as a factor in assessing an award for punitive damages; and (iv) a plaintiff's ability to recover punitive damages which are 340 times greater than the actual damages or harm suffered. San Paolo now returns to this Honorable Court to seek review of the second decision of the Court of Appeal following this Court's grant of San Paolo's Petition for Writ of Certiorari and order vacating the Court of Appeal's first decision in this case.

On June 4, 2001, this Court granted San Paolo's Petition for Writ of Certiorari, vacated the decision of the Court of Appeal, and directed that court to reconsider San Paolo's appeal (i.e., the propriety of the punitive damages awarded by the trial court) consistent with *Cooper Industries*. The Court of Appeal was required to conduct an independent assessment of the excessiveness of the punitive damage award to Simon according to the fixed, objective criteria set forth in *BMW* to ensure the protection of San Paolo's constitutional rights under the Due Process Clause of the Fourteenth Amendment and the prohibition of the Eighth Amendment against excessive fines. Instead, in the absence of any specific direction as to how it should conduct its independent review and in light of the deferential California passion and prejudice standard for reviewing such awards, *the Court of Appeal admittedly reviewed the record in the light most favorable to Simon*, adopted wholesale his version of the facts, and *speculated as to why the jury made certain findings*, all in an effort to support the verdict. In doing so, the Court of Appeal *failed to even address the factual issues and contentions raised by San Paolo in its two briefs* filed after the reversal and remand. In fact, the Court of Appeal *reissued its original Opinion with only minor changes*, even though that decision has been vacated by this Court.

The award of punitive damages presents unsettled questions of law that affect the public at large. The award of punitive damages in this case (a sum 340 times greater than the attendant award of compensatory damages) is but one example of the excessive punitive damage awards by both state and federal court juries in violation of defendants' due process rights under the Eighth and Fourteenth Amendments which continue to plague courts across the country. Notwithstanding the fact that this Court has set certain legal guideposts[7] for determining whether an award of punitive damages is grossly excessive and has now pronounced the appropriate standard of review to be employed in applying these factors, the duties of the appellate courts in applying this standard of review remain unclear, as reflected in the Court of Appeal's recent decision herein.

This Court has already held that the determination of whether a punitive damage award is grossly excessive is of constitutional significance. "The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." *Solem v. Helm*, 463 U.S. 277, 284 (1983). This principal can be traced back to the Magna Carta. Magna Carta, ch. 20, reprinted in W. McKechnie, Magna Carta 284 (2d ed. 1914). Due process requires that a person receive "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. "To punish a person because he has done what the law plainly allows him to do is a due process violation of

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[7] These guideposts include the relative reprehensibility of the defendant's conduct, the relationship between the jury's actual compensatory and punitive damage awards, and a comparison of the award to analogous civil and criminal penalties. The Court also identified other comparative factors, such as whether the tort was purely economic, intentional, and/or repeated. *BMW*, 517 U.S. at 575-584.

the most basic sort." *Id.* at 573, citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). Generally, appellate court review of constitutional claims based upon the Bill of Rights is conducted de novo. See, e.g., *Haynes v. Washington*, 373 U.S. 503, 515 (1963) (appellate review of Due Process Clause claims is a "duty of constitutional adjudication"). Such independent review is necessary "if appellate courts are to maintain control of, and to clarify, the legal principles." *Ornelas v. United States*, 517 U.S. 690, 698 (1996). While the Court has now established the standard of review to be applied when assessing the constitutional propriety of an award of punitive damages, courts nationwide still require guidance regarding the application of this standard of review.

In the absence of such guidance, undue deference can be (and has been) accorded to the discretion of trial courts, thereby inviting divergent development of the law in this area, leading to conflicting constitutional standards. Notably, when reviewing the propriety of an award of punitive damages, California courts determine if "the entire record viewed most favorably to the judgment indicates the award was rendered as the result of passion and prejudice." *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381, 388 (1984); internal citation omitted; see also *Sierra Club Foundation v. Graham*, 72 Cal.App.4th 1135, 1161 (1999) ("the reviewing court will intervene if the verdict is so palpably excessive as to raise the presumption of passion and prejudice").[8] This "passion and prejudice" inquiry is a

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[8] The deference exercised by California courts in reviewing a punitive damage award under both state and federal standards continues to surface across the country notwithstanding this Court's decision in *Cooper Industries*. See, e.g., *Waddill v. Anchor Hocking, Inc.*, 27 P.3d 1092, 1098 (Ore. App. 2001), quoting *Parrott v. Carr Chevrolet, Inc.*, 331 Ore. 537, 555, 17 P.3d 473 (2001) ("A jury's punitive damages award is not 'grossly excessive' – and, therefore, will not be disturbed on review - if

species of the deferential substantial evidence standard of review and therefore patently conflicts with the de novo standard pronounced by this Court. *Fortman v. Hemco, Inc.*, 211 Cal.App.3d 241, 259 (1989). Nonetheless, many state and federal courts continue to apply such deferential standards and have declined to apply the *Cooper Industries* standard where the appellant has not specifically argued that the award violated its constitutional rights. See, e.g., *Middlebrooks v. Hillcrest Foods*, 256 F.3d 1241, 1249 (11th Cir. 2001); *Stroud v. Lints*, 760 N.E.2d 1176 (Ind.Ct.App. 2002); *Time Warner Entertainment Co. v. Six Flags Over Georgia, LLC*, 2002 WL 472306 (Ga.App. 2002). Other courts, however, have applied the *Cooper Industries* de novo standard of review to *all* excessive punitive damage claims. See, e.g., *Campbell v. State Farm Mut. Auto. Ins. Co.*, 432 Utah Adv.Rep. 44 (Oct. 10, 2001).

Only through this Court's recitation of the mechanics of conducting a strict, independent appellate review of punitive damage awards can this Court's substantive due process limitation on grossly excessive punitive damage awards be meaningfully enforced and protected. See *BMW*, 517 U.S. 559; *TXO Production Corp. v. Alliance Resources Corp.* ("*TXO*"), 509 U.S. 443 (1993); *Haslip*, 499 U.S. 1. This constitutional protection continues to be eroded by divergent appellate standards of review. In the instant case, the Court of Appeal, although referring to the de novo standard set forth in *Cooper Industries*, reviewed the record "in the light most supportive of the verdict" and relied upon "implied factual

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it is within the range that a rational juror would be entitled to award in light of the record as a whole"); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d 1335, 1347-1348 (Fed. Cir. 2001) ("if a punitive damage determination rests on purely factual issues, we are to assume that those factual issues have been resolved adversely to the defendant, absent contrary indication").

findings of the jury" in upholding an award of punitive damages 340 times greater than the actual damages awarded. (App., *infra*, A-7-8.) Such review effectively deprives the defendant of any rationality or predictability to the constitutional analysis and prevents any true adherence to the due process limitations on excessive punitive damage awards developed by this Court.

Without an appellate court's independent assessment of the excessiveness of a punitive damage award according to fixed, objective criteria devoid of deference of any kind to the award or the plaintiff's presentation of the record, a defendant's constitutional protections are rendered meaningless. See *BMW*, 509 U.S. at 466 (Kennedy, J., concurring). Continued resort to deferential standards of review serves only to sanction a jury's irrational verdict instead of subjecting it to the rigors of constitutional review, as required by this Court. Only through a rigorous application of the de novo standard of review can precedent be established, the risk of confusion and arbitrariness minimized, predictability and reasonableness restored, and constitutional limits on awards of punitive damages enforced. See *Thompson v. Keohane*, 516 U.S. 99, 109-110, 115-116 (1995); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 502 (1984).

Strict de novo review is necessary to guard against punitive damage awards exceeding the constitutional limits established by this Court. Only through "a detailed examination" of such awards, constrained by the guideposts established by this Court, can the nationwide trend of grossly excessive punitive damage awards be curtailed. *BMW*, 517 U.S. at 595 (Breyer, J., concurring). The continued deferential review of the record by courts throughout the nation in the absence of guidance on applying this standard of

review undermines these goals.[9] As Justice Janice Brown of the California Supreme Court recently observed: "without clear guidance, judicial over-sight of punitive damage awards will not be uniform, and the resulting gross variability in awards will ultimately implicate the rights of defendants to due process and the equal protection of the laws under our state Constitution. (Cal. Const., art. I, 7, subd. (a).)" *Lane v. Hughes Aircraft*, 22 Cal. 4th 405, 421-422 (2000) (Brown J., concurring), *cert. denied*, 531 U.S. 928.[10] *In re the Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001)

The instant case has been tried to two juries and fully developed on appeal, including the grant of a Petition for Writ of Certiorari. As a result, this case serves as the perfect vehicle for this Court's issuance of "clear guidance" as to the proper mechanics for applying the heightened level of review required in assessing punitive damage awards.

1. The Mechanics of Appellate Review of Punitive Damage Awards Requires Further Development

On May 14, 2001, this Court issued its decision in *Cooper Industries*. The Court had granted the Petition for Writ of Certiorari of Cooper Industries, Inc. ("Cooper"),

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[9] Runaway punitive damage awards have also caused a chilling effect on job creation, among other things. One recent study has found that fear of liability for such damages has prompted many firms to discontinue or decide against introducing a new product. See S. Rep. No.105-32, at 41-42 (1997) (Senate Commerce Committee Report on Product Liability Reform Act of 1997).

[10] Such arbitrariness distorts settlements by adding disproportionate leverage to a plaintiff's demands, as well as uncertainty." *Lane v. Hughes Aircraft*, 22 Cal.4th at 427. Further, "[r]atio analysis as required by *BMW* helps avoid over deterrence." *In re the Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001); *BMW*, 517 U.S. at 593 (Breyer, J., concurring).

expressly on the issue of whether, under the Due Process Clause of the Fifth Amendment to the United States Constitution, the standard of review of a federal trial court's ruling on a challenge to the constitutionality of a punitive damage award is on an abuse of discretion or de novo basis. *Cooper Industries* involved an action by Leatherman Tool Group, Inc., ("Leatherman"), for trade-dress infringement, unfair competition, and false advertising under the Lanham Act as well as common-law unfair competition, claiming that Cooper had illegally copied, advertised, and sold an imitation of Leatherman's Pocket Survival Tool ("PST"), dubbed the ToolZall. The jury awarded Leatherman $50,000.00 in compensatory damages, plus $4,500,000.00 in punitive damages (90 times the amount of purely economic compensatory damages). As in the instant case, in an unpublished opinion, the appellate court (the Ninth Circuit Court of Appeal) applied a deferential standard of review, determining that the federal district court did not abuse its discretion in refusing to reduce the punitive damage award. In reversing the Ninth Circuit, this Court held that appellate courts should apply a *de novo* standard when reviewing district court determinations of the constitutionality of punitive damages awards and that the Ninth Circuit had erred in applying the less demanding abuse-of-discretion standard.

In *Cooper Industries*, it seemed likely to this Court that "a thorough, independent review of the District Court's rejection of petitioner's due process objections to the punitive damages award might well have led the Court of Appeals to reach a different result." *Cooper Industries*, 121 S.Ct. at 1688. In fact, this Court's own consideration of the facts and law revealed questionable conclusions by the District Court that might not survive de novo review. It also illustrates why the answer to these constitutional questions does indeed depend upon the standard of review being used. *Id.* at 1688-1689. As in the instant case, this Court vacated the

judgment of the appellate court and remanded the cause for further proceedings consistent with its Opinion. On remand, the Ninth Circuit remanded the case to the trial court, setting the *maximum* award of punitive damages at $500,000.00, or 10 times the compensatory damages awarded (instead of upholding the prior award of $4,500,000.00). *Leatherman Tool Group, Inc. v. Cooper Industries, Inc.* (*"Cooper Industries II"*), 2002 WL 841188, *6 (9th Cir. 2002).

Among other things, the Ninth Circuit noted that "Cooper's conduct caused relatively little actual harm" due to the issuance of a preliminary injunction preventing Cooper from selling "the ToolZall for more than a short period of time."[11] *Cooper Industries II*, 2002 WL 841188, *3. Similarly here, Simon's only actual harm was his out-of-pocket attorneys' fees. Further, just like Leatherman Tool Group, Simon was not deceived "in any significant way." In fact, he never even entered into an agreement or

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[11] Significantly, the Ninth Circuit rejected as "impermissible speculation" Leatherman's attempt to justify the punitive damage award by relying upon *potential harm* in the form of Cooper's anticipated gross profits had no preliminary injunction been issued: "While we do not wish to reward Cooper for its improper conduct, neither can we guess as to what greater expenses, delays, or lost sales it might have incurred had it acted properly." *Cooper Industries II*, 2002 WL 841188, *3. Here, the Court of Appeal speculated on so-called potential harm caused to Simon, even though this claim had been rejected by the jury. Moreover, here, San Paolo actually sold the property for less than the amount set forth in the Letter of Intent. The Ninth Circuit also did not permit its "strong disapproval of Cooper's conduct" or its "serious doubts as to whether Cooper fulfilled its legal obligations under the preliminary injunction in a diligent manner" to justify the constitutionally excessive punitive damage award therein. *Cooper Industries II*, 2002 WL 841188, *4. Here, in both of its Opinions, the Court of Appeal relied in large part upon its own disapproval and condemnation of the conduct of one San Paolo officer (who was never sued) to justify the excessive punitive damage award to Simon.

undertook any obligation to purchase the property. The only damage suffered by Simon related to fees which he incurred in having his attorney review the Letter of Intent. Like *Cooper Industries*, "this simply is not a case in which there is evidence of any significant actual harm to consumers or to" Simon. If anything, the conduct of San Paolo "was more foolish than reprehensible." *Cooper Industries II*, 2002 WL 841188, *5. In this light, the punitive damage award herein should similarly be reduced to no more than 10 times the actual harm suffered, or $50,000.00.

Cooper Industries has been viewed as the first step in "tightening the lid" on awards of constitutionally excessive punitive damages. In Alabama (the source of the *BMW* decision), one federal district court observed:

> In *BMW*, a lid was put in place. But, was the lid put on tight enough to stem the flood of kneejerk removals? The lid was tightened on May 14, 2001, when the Supreme Court decided *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* . . . There the Court replaced the deferential standard for review of a trial court's order reducing or fixing punitive damages with an appellate court's obligation to evaluate de novo the constitutional limitation on punitive damages in a particular case. . .

Arnold v. Guideone Specialty Mut. Ins. Co., 142 F.Supp.2d 1319, 1321 (N.D. Ala. 2001) (remand granted where insurer could not establish diversity jurisdiction based on risk that jury would award more than $74,000.00 in punitive damages on bad faith claim involving compensatory damages of $1,000.00).

As a result of the *Cooper Industries* decision, it is now clear that, "as a matter of constitutional law, the Court is required to conduct an independent review of the award, and

in doing so we focus on three general criteria: the degree of the defendant's reprehensibility or culpability; the relationship between the amount of the penalty and the harm to the victim resulting from the defendant's actions; and the sanctions imposed in other cases for comparable misconduct. *Cooper*, 121 S.Ct. at 1684-1685." *Equal Employment Opportunity Comm'n v. Mid-Continent Security Agency, Inc.*, 2001 WL 800089, *4 (N.D. Ill. 2001). The use of this new standard, however, requires further development. Specifically, can the appellate court give deference to so-called "implied" findings of the jury? Can the court speculate about what the jury did or did not believe? Should not an independent review entail a complete, factual review of the evidence?

2. The Court of Appeal's Second Opinion Demonstrates a Conflict Between Federal and State Standards of Reviewing Punitive Damage Awards (and the Need for Clarification as to How These Standards Must Be Applied)

The vast majority of the Second Opinion is identical to the Prior Opinion vacated by this Court. This time, however, the Court of Appeal omits its references to the substantial evidence standard and includes an expanded discussion of the *BMW* factors. (App., *infra*, A-7-8, 16-17, 19-25; B-5-6, 14, 17-18.) However, instead of engaging in a de novo review of the record and independently examining each of the *BMW* factors in light thereof, the court relies upon the identical deferential presentation of the record as before,[12] alleged litigation misconduct by a former San Paolo officer, a claim for compensatory damages rejected by the jury, and an

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[12] Compare App., *infra*, B-6-9, with App., *infra*, A-7-11, and App., *infra*, B-17-21, with App., *infra*, A-16-20.

analogy to criminal penalties to justify the amount of punitive damages awarded.

In the Second Opinion, the Court of Appeal again *acknowledges* that it has applied a substantial evidence standard and deferentially reviewed the trial evidence "in the light most favorable to the prevailing party, giving him the benefit of every reasonable inference, and resolving conflicts in support of the verdict." (App., *infra*, A-7.) This is reflected by the fact that much of the Court's discussion of the record mirrors that set forth in its Prior Opinion as well as the version set forth in Simon's appellate briefing,[13] and not the record itself, which is devoid of any factual findings by the jury other than the following: (a) there was no binding and enforceable agreement between the parties; (b) San Paolo made a false promise about a material matter to Simon; (c) "the total amount of all damage suffered by Simon and caused by Simon's reliance upon San Paolo's promise" was $5,000.00; and (d) San Paolo committed oppression, malice or fraud in connection with the false promise. (App. Vol. III, 613-617.)

The jury did not render any other factual determinations.[14] Nonetheless, the Court of Appeal undertakes to affirm the punitive damage award based upon "*implied factual findings of the jury*." (App., *infra*, A-8.) (Emphasis added.) The court again pronounces its intent to "summarize the evidence

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[13] Compare, e.g., App., *infra*, A-19 with Respondents' and Cross-Appellant's Brief, pp. 27, 43; App., *infra*, A-21, n. 9, with Respondent's and Cross-Appellant's Brief, pp. 7, 20. San Paolo's detailed and well-supported presentation of the record in its appellate briefing is summarily dismissed and rejected by the Court of Appeal.

[14] A jury's "imposition of punitive damages is an expression of its moral condemnation," not a factual determination. *Cooper Industries*, 121 S.Ct. at 1683, 1686.

in the *light most supportive of the verdict, for purposes of both constitutional and non-constitutional issues*." (App., *infra*, A-8.) (Emphasis added.) This is a marked departure from *Cooper Industries*, where the Court clearly required the appellate courts to independently review all of the evidence, not just the facts favorable to the respondent or the unsupported argument of counsel, to determine if a challenged punitive damage award is indeed excessive.

After acknowledging that it "might agree with San Paolo that the award was unusually large," the Court of Appeal pronounces that it is not its task "to discard the judgment of the jury in order to substitute our own"[15] and that it need only "determine de novo whether the award is so grossly disproportional to the gravity of the wrong as to violate due process."[16] (App., *infra*, A-25.) Such an analysis, however, clearly contravenes the mandate of this Court. The Second Opinion demonstrates that courts are in need of further guidance from this Court as to their duties in applying an independent standard of review in this context.

In analyzing the reprehensibility of San Paolo's conduct, the Court of Appeal fails to even consider the facts of this case which militate in favor of a substantial reduction in the punitive damage award, including that it involves one transaction for the sale of a commercial property between two sophisticated parties resulting in only nominal, economic harm. See *FDIC v. Hamilton*, 122 F.3d 854, 862 (10th Cir. 1997); *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995);

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[15] This is precisely what the standard set forth in *Cooper Industries* requires the reviewing court to do: independently review the award of punitive damages de novo. *Cooper Industries*, 121 S.Ct. at 1685-1686.

[16] In its Prior Opinion, the Court of Appeal invoked this same criterion when addressing the propriety of the punitive damage award under California's passion and prejudice standard. (App., *infra*, B-21.)

Neibel v. Trans World Assurance Co., 108 F.3d 1123, 1132 (9th Cir. 1997). There was absolutely no evidence of any policy, practice or repeated conduct of San Paolo in this regard.[17] In fact, not even the supervisor of Duane King (the employee charged with the wrongdoing) was aware of his conduct. (See, e.g., App., *infra*, A-10, 11, 17.) The Court of Appeal further ignores that Mr. King's alleged acts fall relatively low on the "'hierarchy of responsibility,' with acts and threats of violence at the top, 'followed by acts taken in reckless disregard for others' health and safety, affirmative acts of trickery and deceit, and finally, acts of omission and mere negligence.'" *Swinton v. Potomac Corp.*, 270 F.3d 794, 818 (9th Cir. 2001), quoting *Florez v. Delbovo*, 939 F. Supp. 1341, 1348-49 (N.D. Ill. 1996).[18]

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[17] Compare *Time Warner Entertainment Co. v. Six Flags Over Georgia, LLC*, 2002 WL 472306 at *5-6, where the general partner of a limited partnership (and its parent) violated "a confidential relationship of trust requiring the utmost in good faith" by participating in "a premeditated plan surreptitiously executed over a period of years" to devalue their partners' investments for their own benefit by withholding vital business information, competing with them and taking their money.

[18] A soured business deal does not constitute a tort so reprehensible as to justify a punitive damage award greater than 10 to 1. *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 639 (10th Cir. 1996). San Paolo's conduct, resulting in only economic harm, does not approach the dereliction of those wrongdoings traditionally chronicled in punitive damages cases. See, e.g., *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (pattern of nationwide fraud, trickery and deceit involving deprivation of real property rights and interests); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (scheme of misappropriating premiums on life insurance polices cancelled without notice to insureds); *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381 (consumer fraud upon the aged). Here, "the facts alleged herein do not demonstrate any of the criteria enhancing reprehensibility mentioned in *Gore*, such as an act of violence, disregard for the health and safety of others, a pattern of misconduct, or the exploitations of a financially

In its Second Opinion, without authority, the Court of Appeal again attempts to dramatically narrow the 340:1 ratio of punitive to compensatory damages awarded to Simon by positing that it may compare the $1.7 million punitive award to his claimed loss of $400,000.00 due to his inability to purchase the Property, even though the jury rejected this argument.[19] Specifically, the jury rejected Simon's request for damages totaling $1,468,445.00 arising out of the fraud, awarding him only his $5,000.00 in out of pocket expenses. (R.T., pp, 881:10-14, 930:28-931:3, App., Vol. IV, pp. 183-185.) In adopting Simon's argument that his punitive damage award could be based upon his alleged benefit of the bargain (or lost profits) in order to avoid the constitutionally excessive ratio of 340:1, the Court of Appeal improperly drew an implication *directly contrary* to the express factual determinations of the first jury.

The Court of Appeal asserts that Simon's actual harm was $400,000.00, positing that he was denied this recovery based

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vulnerable target." *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 272 F.3d at 1349, citing *BMW*, 517 U.S. at 576.

[19] The jury determined that there was no binding and enforceable agreement between San Paolo and Simon, be it for the sale of the Property, to conduct exclusive negotiations, or "to in good faith seek New York approval of the transaction." (Respondent's and Cross-Appellant's Brief, p. 25; Supplemental Joint Appendix, Vol. VIII, p. 2147.) The appellate court must defer to the jury's findings of fact, including that Simon was never contractually entitled to purchase the Property from San Paolo, "unless they are clearly erroneous." *Cooper Industries*, 121 S.Ct. at 1688, n. 14. On the other hand, the Court of Appeal must independently review the jury's award of punitive damages, which is not a finding of fact, but instead a "private fine[] intended to punish the defendant and to deter future wrongdoing." *Id.* at 1683, 1686.

upon solely the prohibition of a benefit-of-the-bargain damage recovery in this situation under California law. (App., *infra*, A-21.) An independent review of the record, however, reveals that no such instruction limiting the damages available to Simon was ever given to the jury or that the jury somehow otherwise considered this principle. (See R.T., pp. 836-856.) The jury's award of only nominal compensatory damages to Simon is a factual determination binding upon the appellate court. *Cooper Industries*, 121 S.Ct. at 1686.

Citing *TXO*, 509 U.S. at 460, and *Haslip*, 499 U.S. at 21-22, the Court of Appeal also invokes the principle that potential harm "*likely to result* from the defendant's conduct" may be considered in comparing the punitive damage award to the harm suffered. (App., *infra*, A-23.) Under *TXO*, "the touchstone is the potential harm that would have likely resulted from the dangerousness inherent in defendant's actual conduct. Thus, a court may not justify the award of punitive damages in a particular case by overlooking the actual events and focusing on potential victims of similar hypothetical torts." *Pulla v. Amoco Oil Co.*, 72 F.3d at 659. *TXO* involved a pattern of continuing fraud across the nation which was not fully successful, while the instant action involved one false promise to sell one commercial property, which is final and complete. In light of the foregoing and the absence of any such widespread policy or practice of San Paolo, there is no potential future harm upon which any court can rely in affirming the excessive punitive damage award.

The punitive damage award of $1,700,000.00 bears no reasonable relationship to Simon's actual damages of $5,000.00. Federal courts have repeatedly held that punitive damages are excessive when the proportion between punitive and actual damages is much closer than in the present case. See, e.g., *Haslip*, 499 U.S. at 23 (4 to 1 is "close to the line"); *FDIC v. Hamilton*, 122 F.3d at 861 (10 to 1 ratio is

"unconstitutionally excessive in a broad range of cases"); *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1248-1249 (9th Cir. 1998), cert. denied, 525 U.S. 930 (130 to 1 is far beyond any amount approved by Alaska courts); *BMW*, 517 U.S. at 583, citing *TXO*, 509 U.S. at 482 (a breathtaking 500 to 1 ratio must surely "raise a suspicious judicial eyebrow").[20] *Auerbach v. Great Western Bank*, 74 Cal.App.4th 1172, 1190 (1999) *Seeley v. Seymour*, 190 Cal.App.3d 844 (1987)

Significantly, the Court of Appeal's decision directly conflicts with its own prior decision in *Rufo v. Simpson*, 86 Cal.App.4th 573 (2001), which, unlike this case, involved alleged criminal conduct (the murders of Nicole Brown Simpson and Ronald Lyle Goldman) by O.J. Simpson and claims of physical injury. In that case, Mr. Goldman's parents recovered compensatory damages of $8.5 million, while the personal representatives of the Goldman and Brown Simpson estates were awarded minor compensatory damages (limited to loss sustained by the decedents before death [Cal. Code Civ. Proc., § 377.34]) and punitive damages of $12.5 million each (totalling $25 million). In rejecting Simpson's objection to the punitive damage award, the Court of Appeal reasoned:

> In this case the first two factors, the reprehensibility of the defendant's conduct and the severity of harm to the victims, have the greatest weight legally possible. In effect the jury found that **Simpson committed two deliberate, vicious murders. This is the most reprehensible conduct that society condemns** and is ordinarily punished under California criminal law

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[20] California courts have also found excessive punitive to actual damage award ratios closer than that awarded to Simon herein. See, e.g., *Auerbach v. Great Western Bank*, 74 Cal.App.4th 1172, 1190 (1999) (385 to 1 found "out of proportion to the actual damages suffered"); *Seeley v. Seymour*, 190 Cal.App.3d 844, 866-869 (1987) (13.3 to 1 is clearly excessive).

> by a sentence of death or life imprisonment without possibility of parole. . . . The harm suffered by the victims was the maximum possible; they were intentionally killed. **This case cannot be compared to punitive damages involving a business fraud resulting only in economic harm.**[](emphasis added)

Rufo v. Simpson, 86 Cal.App.4th at 623-624

In *Rufo*, where the conduct was infinitely more reprehensible than that of San Paolo herein, the punitive damage award was still only less than 1.5 times the compensatory award.[21] Notably, the same appellate court was involved in (and upheld) both awards of punitive damages. Clearly, the independent review contemplated by *Cooper Industries* was not conducted in this case. In light of the facts of this case, the punitive damage award of 340 times the actual harm as determined by the jury simply cannot be justified, especially if subjected to the rigorous, heightened standard of review set forth in *Cooper Industries*.

B. The Courts Require Guidance as to the Consideration to Be Given to a Defendant's Wealth in Determining the Constitutionality of a Punitive Damage Award

Both federal and state courts in California and elsewhere routinely review the wealth/financial condition of a defendant in passing on the propriety of a punitive damage award. See, e.g., *Adams v. Murakami*, 54 Cal.3d 105, 111, 123 (1991); *FDIC v. Hamilton*, 122 F.3d at 862; *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d at 641-642; *Owens-Corning Fiberglas Corp. v. Ballard*, 739 So.2d 603, 607 (Fla. Ct.App. 1998); *Oberg v. Honda Motor Co., Ltd.*,

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[21] If a ratio of 1.5 to 1 is appropriate in a double murder case, query how can a higher ratio be justified herein?

888 P.2d 8, 13 (Ore. 1995); *Stranahan v. Fred Meyer, Inc.*, 958 P.2d 854, 871 (Ore. 1998). This practice has continued in the shadow of *Cooper Industries*. See, e.g., *Time Warner Entertainment Co. v. Six Flags Over Georgia, LLC*, 2002 WL 472306 at *6 (the fact that defendants are "corporate entities with collective assets measured in billions of dollars" supports $257 million punitive damage award); *Waddill v. Anchor Hocking, Inc.*, 27 P. 3d at 1098 ("the amount of the award is approximately one month of defendant's net profit").

Here, San Paolo's wealth has been constantly emphasized in support of the punitive damage award. (App., *infra*, A-27-28, B-20-23.) In addition to the fact that San Paolo's financial condition does not support the instant award, wealth is not even one of the factors enumerated by this Court in either *BMW* or *Cooper Industries* to be considered in evaluating the constitutionality of a punitive damage award. See Cooper Industries, 121 S.Ct. at 1687.[22] Further, the use of wealth evidence in punitive damages cases has been strongly criticized by this Court. See *TXO*, 509 U.S. at 464, 491 (O'Connor, J., dissenting); *BMW*, 517 U.S. at 574, 585. There is a conflict between: (a) the law of California and other

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[22] This fact has led at least one court to conclude that such evidence is irrelevant and inadmissible. See *Pivot Point Int'l v. Charlene Prods., Inc.*, 932 F. Supp. 220 (N.D. Ill. 1996). One respected federal appellate judge has even noted that "having a large net worth (is not) the wrong to be deterred!" *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992). Recognizing that "the size of the corporate defendant is not an additional evil that in itself warrants a substantial penalty," it has been observed that "the full extent of a defendant's wealth provides too unbounded an upper limit to be suitable means to calibrate punitive damage awards." *Lane v. Hughes Aircraft Co.*, 22 Cal.4th at 427 (Brown, J., concurring). Most recently, on remand, in applying the standard pronounced in *Cooper Industries*, the Ninth Circuit questioned how much, if any, consideration should be given to the defendant's wealth and "potential deterrent effect of a punitive damages award." *Cooper Industries II*, 2002 WL 841188, *5-6.

states, which require the review of a defendant's financial condition when passing on the propriety of a punitive damage award, and (b) the federal constitutional standard set forth in *BMW*, which does not. An analysis which would support a multimillion dollar award solely because the defendant had enough resources to pay the award, even if the misconduct was relatively minor and the compensatory damages nominal, should be rejected. Moreover, "[e]vidence of a defendant's net worth can lead to a punitive damages award based on bias, prejudice, or passion. Introduction of such evidence by plaintiffs is, at bottom, 'an improper "appeal to class prejudice and pandering to the perception that corporations wield disparate power," "generally made for no reason" "other than to prejudice . . . the jury's sworn duty to reach a fair, honest and just verdict."'" Mark A. Behrens, Joseph P. MastroSimone & Victor E. Schwartz, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, BROOK L. REV. (Winter 1999), quoting *Strickland v. Owens Corning*, 142 F.3d 353, 359 (6th Cir. 1998) (citations omitted). The continued viability of the wealth of the defendant as a factor in determining whether a punitive damage award is excessive must therefore be addressed by this Court.

This Court should grant review in order to provide guidance on this issue of nationwide importance and prevent punitive damage awards from continuing to "run wild." *Haslip*, 499 U.S. at 18. These issues are increasingly likely to recur, as juries continue to award jaw-dropping punitive damage awards which are completely out of proportion to the harm suffered by the plaintiff.

CONCLUSION

The decision of this Court addressing the standards for determining the propriety of an award of punitive damages has left a sharply focused issue of wide-ranging interest untouched: what are the duties of an appellate court when conducting an independent review of such an award? Both litigants and triers of fact also remain without guidance as to the consideration to be given to a defendant's wealth in passing on the constitutionality of a punitive damage award. Finally, the propriety of even considering a defendant's wealth in assessing a punitive damage award remains in doubt. For these reasons, it is respectfully requested that this Petition for Writ of Certiorari be granted.

Date: May 17, 2002

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

Court of Appeal Second District
Filed
November 7, 2001
Joseph A. Lane Clerk

LIONEL SIMON, DBA LIBERTY PAPER COMPANY,

Plaintiff, Respondent and Cross-Appellant,

v.

SAN PAOLO U.S. HOLDING COMPANY, INC.,

Defendant, Appellant and Cross-Respondent.

B121917
(Super. Ct. No. BC152431)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard P. Kalustian, Judge. Affirmed.

Epport & Richman, LLP, Beth Ann R. Young, Steven N. Richman and Lawrence A. Abelson for Defendant, Appellant and Cross-Respondent.

Knapp, Petersen & Clarke, Andre E. Jardini, Kevin J. Stack and Mitchell B. Ludwig for Plaintiff, Respondent and Cross-Appellant.

Our original judgment, entered on August 28, 2000, was vacated by the United States Supreme Court on May 29, 2001, and the cause was remanded to determine de novo whether the award of punitive damages violated the defendant's right to due process under the federal Constitution.[1] We have now reconsidered the matter, applying a de novo standard of review to the due process issue, and we again affirm the judgment.

BACKGROUND

On June 21, 1996, cross-appellant, Lionel Simon, commenced this action against San Paolo Bank (hereinafter "the bank") and appellant, San Paolo U.S. Holding Company, Inc. ("San Paolo").[2] Simon sought specific performance of an alleged contract to purchase real property, located at 816 Figueroa Street in Los Angeles. He also sought damages for breach of the contract, as well as damages for fraud, consisting of a false promise to sell the property to Simon under certain terms and conditions.

The issues of liability and punitive damages were tried separately by jury, beginning on August 1, 1997.[3] By special

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[1] *San Paolo U.S. Holding Co., Inc. v. Simon* (No. 00-1457, May 29, 2001) 121 S.Ct. 2190.

[2] San Paolo Bank, the parent company of San Paolo U.S. Holding Company was eliminated as a defendant after its motion for summary judgment was granted. We affirmed the judgment entered in its favor in case No. B113208, filed May 21, 1998.

[3] San Paolo states in its opening brief that a pretrial summary adjudication eliminated the specific performance count and one of two contract counts. Simon responds that the summary judgment eliminated a cause of action for tortious breach of the covenant of good faith and fair

verdict rendered on August 12, 1997, the jury found that there was no enforceable contract between the parties. But the jury found in favor of Simon on the fraud cause of action, awarded him $5,000 in compensatory damages, and $2,500,000 in punitive damages.

San Paolo brought motions for a new trial, a reduction in punitive damages, and judgment notwithstanding the verdict. Simon brought a motion for new trial on damages. The trial court denied Simon's motion, as well as San Paolo's motion for judgment notwithstanding the verdict. The trial court granted San Paolo's motion for new trial, subject to Simon's acceptance of a reduction in punitive damages to $250,000. Simon refused to accept the remittitur, and the issue of punitive damages was tried to a new jury, beginning March 6, 1998.

The second jury assessed punitive damages in the amount of $1,700,000, and San Paolo's motion for new trial was denied. On April 8, 1998, judgment was entered against San Paolo in the amount of $1,705,000. San Paolo filed a timely notice of appeal from the judgment, and Simon filed a timely notice of cross-appeal.

The matter was briefed and argued, and we affirmed the Superior Court's judgment after finding, among other things, that the punitive damages assessed against appellant San Paolo U.S. Holding Company, Inc. (hereinafter, "San Paolo") did not violate its right of due process under the United States Constitution. Thereafter, *the United States Supreme Court announced its decision in Cooper Industries,*

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dealing, not a contract claim. However, neither the motion nor the order granting it has been made a part of the record on appeal.

Inc. v. Leatherman Tool Group, Inc. (2001) 532 U.S. 424 ("*Leatherman*"), which held that appellate courts must apply a de novo standard of review when passing on determinations of the constitutionality of punitive damages awards. Then, the Supreme Court granted San Paolo's petition for writ of certiorari, vacated our earlier judgment, and remanded the cause to this court for further consideration in light of *Leatherman*.[4] We requested and received supplemental briefing from the parties addressed to this topic, and we have heard further argument on the sole issue of whether the punitive damage award comports with due process under the United States Constitution.

DISCUSSION

I. San Paolo's Appeal

A. *The First Trial*

We leave our summary of the evidence adduced at the first trial to our discussion of Simon's cross-appeal because, although San Paolo contends that there was no substantial evidence to support any of the elements of fraud, it refers only to evidence presented during the second trial, which involved just the issue of punitive damages. San Paolo's opening brief and reply brief have set forth none of the evidence presented at that first trial.

It is presumed that the record contains evidence to sustain every finding of fact, and it is the appellant's burden to demonstrate the absence of substantial evidence to support a challenged finding, by setting forth all the material evidence

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[4] See footnote 1.

on the point. (*Foreman & Clark Corp. v. Fallon* (1971) 3 *Cal.3d 875, 881; Cal. Rules of Court, rule 13.)* Since San Paolo has failed to do so, we presume the evidence was sufficient to support the verdict, and deem the point waived. (See *Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.)

San Paolo also contends that there was no liability for fraud as a matter of law, because the jury found there was no contract. San Paolo's contention appears to be based entirely upon its interpretation of the special verdict finding that there was no "binding and enforceable agreement" between the parties. San Paolo infers that the jury found that no contract had been formed in the first instance. Thus, it reasons, Simon was not induced to enter into a transaction, and cannot be said to have relied upon the false promise.

San Paolo's reasoning is flawed, because the jury was not asked to determine whether a contract had been formed. Instead, it was asked to make the legal conclusion whether an enforceable contract existed. Further, the use of "and" instead of "or" to connect the words "binding" and "enforceable" indicates the jury may have found that a contract had been formed but was not enforceable, or that no contract had been formed at all. It is impossible to discern from the special verdict which conclusion the jury made.

A special verdict must determine ultimate facts, not conclusions of law. (Code Civ. Proc., § 624; see 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 355, p. 404.) And it must state those facts directly, not by implication. (*Breeze v. Doyle* (1861) 19 Cal. 101, 103.) The special verdict in this case was defective in that it called for a conclusion of law, which merely implied the facts upon which it was based. The jury's finding of fraud implies that it found that the parties did

enter into a contract, but the contract was unenforceable. We cannot conclude that the jury found that no contract was formed in the first instance.

San Paolo is, in effect, inviting us to infer a contradictory finding, while rejecting a reasonable interpretation that would support the judgment. But San Paolo has waived any error in the form of the special verdict, by failing to object to it. (*Brokaw v. Black-Foxe Military Institute* (1951)37 Cal.2d 274, 280.) We therefore decline the invitation.

A cause of action for promissory fraud requires proof of an unperformed promise, made about a material fact, without any intention of performing it, and with the intent to deceive the plaintiff or to induce entry into a transaction; and upon which the plaintiff justifiably and injuriously relies. (*Muraoka v. Budget Rent-A-Car, Inc.* (1984) 160 Cal.App.3d 107, 119; Civ. Code, §§ 1572, subd. 4, 1709, 1710.) Liability does not depend upon whether the promise is ultimately enforceable as a contract. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) "If it is enforceable, the [plaintiff] . . . has a cause of action in tort as an alternative at least, and perhaps in some instances in addition to his cause of action on the contract.' [Citation.]" (*Id.* at p. 638, quoting Rest.2d Torts, § 530, subd. (1), com. c, p. 65; and citing *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 29.)

San Paolo relies upon *Maynes v. Angeles Mesa Land Co.* (1938) 10 Cal.2d 587, 589, and Justice Clark's dissent in *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 832. Neither case touches upon the requirement, or lack of requirement, of an enforceable contract as an element of

promissory fraud.[5] We therefore reject San Paolo's contention that there was no liability for fraud as a matter of law.

B. *The Second Trial*

We summarize the trial evidence in the light most favorable to the prevailing party, giving him the benefit of every reasonable inference, and resolving conflicts in support of the verdict. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) Our summary differs significantly from San Paolo's, because San Paolo has chosen to draw all reasonable inferences in favor of its own position, and to disregard its obligation to set forth in its brief all the material evidence, not merely its own.

In its supplemental brief after remand, San Paolo seems to suggest that the de novo review of constitutional issues mandated by the Supreme Court requires a de novo resolution of conflicting factual issues. We disagree. Although the Court held that we must determine the constitutionality of a punitive damage award under a de novo standard of review, it explained by analogy to the review of the imposition of criminal fines and the determination of probable cause in criminal cases, that reviewing courts must independently apply a constitutional standard to the facts of a particular case, but should defer to the factual findings of the trial court unless they are "clearly erroneous." (*Leatherman, supra*, 532 U.S. _____, 121 S.Ct. at pp. 1685-1686, 1688, fn. 14, citing *United States v. Bajakajian*

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[5] Indeed *Egan* does not even involve a claim of promissory fraud. That portion of Justice Clarke's dissent to which San Paolo refers states merely that a careless mistake resulting from poor investigation is not malice, and does not support an award of punitive damages. (See 24 Cal.3d at p. 832.)

(1998) 524 U.S. 321, 336-337, fn. 10 [criminal fine]; *Ornelas v. United States* (1996) 517 U.S. 690, 697, 699 [probable cause].)

Here, the trial court made no factual findings of its own, and by denying the motion for new trial, the trial court did not disturb any of the jury's factual findings. Thus, for the purpose of our review of the due process issues, we shall apply the *Leatherman* standard to the express and implied factual findings of the jury, and reject them only if they are clearly erroneous. Having so stated, however, we have no reason to reject the express or implied factual findings of the jury, since San Paolo has not challenged any of them as clearly erroneous. Thus, we summarize the evidence in the light most supportive of the verdict, for purposes of both constitutional and nonconstitutional issues.

When Simon agreed to purchase from San Paolo the building located at 816 South Figueroa in Los Angeles for $1,100,000, he objected to a term in the seller's offer which would have made the purchase agreement non-binding until close of escrow. San Paolo's broker, William Atha, agreed that the term was not normal, and prepared a draft letter of intent which stated that it would be binding. Although the draft letter of intent stated that it was binding, it also stated that the contract was subject to approval by San Paolo's Los Angeles and New York offices, which were given no later than 3:00 p.m. on June 12, 1996 to act.

In all, the draft letter of intent contained thirteen terms lettered A through M, including the price, terms of the financing to be provided, and deadlines for various acts. Simon agreed to Atha's suggestion to include a requirement that San Paolo negotiate only with Simon, so that "the rug didn't get pulled out again at the end," as it had been several

times during the negotiations by Duane King, San Paolo's vice-president in charge of the sale of the building.[6] Atha worded the requirement as follows: "Seller and Buyer agree to exclusively negotiate upon execution of this letter." Simon was told that minor "housekeeping terms" would be worked out in escrow.

The next day, June 12, 1996, Atha sent the final letter of intent for Simon's signature. It contained a few additional terms, now lettered A through P, and the word "binding" had been removed, but the last paragraph stated: "These terms and conditions are the essential elements of this transaction and any minor modifications or further instructions shall be identified and reflected in escrow in the escrow instructions." A new term requiring a deposit receipt had been added. Concerned that the deposit receipt would not conform to the terms of the letter of intent, Simon added a provision to allow his attorney to approve the deposit receipt and escrow instructions.

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[6] On several occasions, King changed the terms of his offer after Simon had verbally accepted them. In April 1996, Simon asked King what it would take to buy the building, and King told him that if he offered $1,290,000, the bank would finance the property for him, and give him $40,000 improvement allowance. As soon as Simon agreed, King demanded $1,350,000, and offered a $75,000 allowance. When Simon agreed to those terms, King said he would take the offer to New York, but Simon never heard back from him. Later that month, Simon learned that the prior owners had a night of redemption in the property, with eight or nine more months to run. Simon was very concerned about the possibility of redemption, so he offered $1.1 million conditioned upon a six-month escrow. Atha told him King would agree to the long escrow, if he agreed to pay $1.2 million. However, when they met to close the deal, King changed his offer again, demanding to close escrow by June 28, 1996, unless Simon paid $1.35 million. Negotiations broke off until June 10, 1996.

The final letter of intent moved back the deadline for approval by the Los Angeles and New York offices of San Paolo Bank, to June 13, 1996. Upon receipt of such approval in writing, Simon was to deposit $50,000 to open escrow. He was to make his financial statements available within 24 hours after execution of the letter of intent. Simon signed the final letter of intent, and it was sent to King for signature. Shortly past noon on June 12, Atha told Simon that King had signed it, and added, "We have a deal." Atha faxed the fully executed letter of intent to Simon that evening (although he dated the fax cover sheet, "6-11-96"), and in the subject line of the cover sheet, after the words, "Signed Letter of Intent," he wrote in parentheses the word, "nonbinding."

The very same day that he signed the letter of intent, King told Atha that the bank had refused to agree to allow Simon until June 26 to finish his inspections, but would approve it if he completed them by June 21. In fact, he had not talked to New York before making this new demand, and never sought approval of Simon's purchase from anyone with authority to give it in New York. When Simon did not agree to move the date up earlier than June 24, King instructed Atha to refuse to accept Simon's financial statements and deposit. King told his supervisor that Simon had failed to perform, but he did not disclose to him that he had refused to accept Simon's documents and deposit.

On June 12, 13, and 14, without Simon's knowledge, King had been in frequent telephone communication concerning the subject property, with Robert Devogelaere, a business acquaintance of King's, and a mutual client of San Paolo's outside counsel, Richard Scott, with whom King also had several telephone conversations during the same period. On June 13, King told Atha not to disclose to Simon that he had another offer, or that he was negotiating with another

buyer.

Also on June 13, Simon retained attorney Donald Mitchell, who spoke to Atha and King in a conference call the same day, demanding that San Paolo comply with the agreement. That evening, King taxed Simon a letter stating that he was terminating negotiations with him. Simon found the fax the next morning, June 14, when he arrived at his office. Also on June 14, King obtained formal approval for a sale to Devogelaere, and escrow opened the same day.

On June 17, 1996, without disclosing the Devogelaere deal, King agreed to accept June 26 as the deadline for Simon to complete his inspections, as called for in the letter of intent, and offered to discount the purchase price by $5000, to defray Simon's inspection costs. Later that day, however, he said he would need approval from Italy, and that he would accept only $1,500,000. Soon after that, both King and Atha stopped taking Simon's calls.

1. *San Paolo Has Failed To Show An Abuse Of Discretion In Denying Its Motions In Limine To Exclude Evidence*

San Paolo contends that the trial court should have granted its motions in limine to exclude evidence of certain trust deeds and liens recorded after the sale of the property, as well as all testimony by Simon's expert, and any testimony relating to compensatory damages that were not awarded in the first trial. The trial court should have excluded the evidence, San Paolo reasons, because it "was inadmissible and likely misled or confused the jury as to the real issues in the case."

The only authorities cited in support of this

assignment of error relate generally to a trial court's discretion under Evidence Code section 352. (See e.g. *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 36 ["The trial court is vested with the discretion to exclude evidence which may unduly consume time or confuse the jury"]; *Chyten v. Lawrence & Howell Investments* (1993) 23 Cal.App.4th 607, 619 ["The court could . . . properly conclude that . . . probative value was outweighed by factors supporting exclusion."].)

We infer from the cited authorities that San Paolo's contention is not really that the evidence was inadmissible per se, but that the trial court abused its discretion under Evidence Code section 352, in refusing to exclude it. The burden is on a party complaining of the trial court's exercise of discretion to show a clear case of abuse. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) An appellant may not carry this burden simply by inviting the appellate court to have a different opinion of the relevance of the disputed evidence, as San Paolo has done here. (*Fontana Paving, Inc. v. Knecht, Garrison & Tait Associates, Inc.* (1965) 238 Cal.App.2d 724, 726.)

Not only is San Paolo required to demonstrate affirmatively an abuse of discretion, it is required to show that such abuse was "sufficiently grave to amount to a manifest miscarriage of justice . . . . [Citation.]" (*Mission Imports, Inc. v. Superior Court* (1982) 31 Cal.3d 921, 932.) In making such a showing, it is the duty of a party to support its arguments with appropriate references to the record. (Cal. Rules of Court, rule 15(a).) San Paolo's references to the record are limited to the pages where its motions in limine are reproduced.

San Paolo fails to identify the exhibits or even to refer to the page numbers where we might find the evidence that it

claims was admitted over its objection. Further, it fails to refer to the trial court's ruling on its objections, and it fails to refer to or discuss any testimony or other evidence to show how it was prejudiced by the unidentified trust deed and liens and unidentified testimony; and it fails to support its contention with applicable authority. We therefore deem this point abandoned. (See *Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228.)

2. *Malice, Oppression, Or Fraud Was Established In The First Trial*

Referring only to evidence adduced in the second trial, San Paolo complains Simon failed to establish fraud, oppression, or malice by clear and convincing evidence. San Paolo has apparently forgotten that by special verdict, the jury in the first trial expressly found, by clear and convincing evidence, that San Paolo had committed fraud which qualifies for treatment of punitive damages. The only issue in the second trial was the amount of punitive damages to be awarded.

3. *San Paolo Has Not Preserved Misconduct Issues for Appeal*

With no citation to authority, and very little argument, San Paolo contends that Simon's counsel made an improper closing argument, and provides six examples of comments that it contends to have been inflammatory, incorrect, misleading, or baseless.

Except in extreme cases, a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished. (*Horn v. Atchison, T & S.F. Ry. Co.* (1964) 61

Cal. 2d 602, 610.) San Paolo does not contend that it made any such objection or request, and our review of counsel's argument has turned up none.

A party is deemed to have waived misconduct unless "it was of such an egregious nature that it could not have been cured by a corrective instruction to the Jury. [¶] . . . Only misconduct so prejudicial that an admonishment would be ineffective excuses the failure to request such admonishment. [Citation.]" (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 892.)

San Paolo contends that it refrained from objecting or requesting an admonition because "the trial court specifically instructed the parties not to object or otherwise interrupt the other side's closing argument." Thus, San Paolo reasons, it "did not have the opportunity to challenge . . . inappropriate argument at the time it occurred." The trial court gave no such instruction. In reality, the court admonished counsel that it did not want to hear objections based upon a claim that the evidence does not support the argument.

San Paolo suggests that because the statements by Simon's counsel were outrageous on their face, prejudice is obvious. Error is not presumed; it is the appellant's burden to show that the error complained of has resulted in a miscarriage of justice. (*Waller v. TJD, Inc.* (1993) 12 Cal. App.4th 830, 833.) "No judgment shall be set aside, or new trial granted, in any cause, . . . or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. 6, §13.) A miscarriage of justice is shown only when it appears reasonably probable that a result more favorable to the appellant would have been obtained, were it not for the error.

(*People v. Watson* (1956) 46 Cal.2d 818, 834-838.)

San Paolo contends that counsel's argument was so inflammatory that no objection was necessary to preserve the issue. It has taken the alleged misconduct out of context, and not discussed the evidence in relation to counsel's argument. Indeed, the only references to the record are to counsel's statements. Thus, even if we were to entertain this argument, San Paolo has utterly failed to demonstrate that it was prejudiced by the argument rather than the actions attributed to it by the evidence.

4. *Substantial Evidence Established That A Corporate Officer Committed The Act Of Oppression, Fraud, Or Malice*

San Paolo contends that because the fraud was committed by its employee, Simon was required to present some evidence relating to ratification, authorization, or advance knowledge of the employee's unfitness. In support of this contention, San Paolo relies upon the first sentence of Civil Code section 3294, subdivision (b): "An employer shall not be liable for [punitive] damages . . . based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice." San Paolo ignores the second sentence of subdivision (b) of Civil Code section 3294: "With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

The evidence established that San Paolo is a corporation, and King was an officer of the corporation, with authority to sell property on behalf of the corporation. Thus, the "act of oppression, fraud, or malice [was] on the part of an officer," satisfying the requirements of the statute.

5. *The Award Did Not Violate Due Process*

San Paolo contends that the punitive-damage award was so excessive as to violate its right of due process under the federal Constitution. Punitive damage awards that are grossly excessive in relation to a State's legitimate interests in punishing unlawful conduct and deterring its repetition, violate a defendant's right to due process, guaranteed under the Fourteenth Amendment. (*BMW of North America v. Gore* (1996) 517 U.S. 559, 568 ("*BMW*").) When it is asserted, as here, that an award is so grossly excessive as to violate due process, the "guideposts" set forth in *BMW*, *supra*, 517 U.S. at page 574, may provide meaningful assistance to the appellate court's de novo review; thus, we independently measure the degree of reprehensibility of the defendant's wrong, the disparity between the harm or potential harm and the punitive damages award, and the difference between the punitive damages remedy and the civil penalties authorized or imposed in comparable cases. (See *Leatherman*, *supra*, 532 U.S. at p._, 121 S.Ct. at pp. 1684-1685.)

Discussing only evidence favorable to its position, San Paolo contends that its conduct was not "particularly reprehensible," because it caused only "nominal" economic harm and was a single act. Further, it contends that by the time of trial King was no longer employed by San Paolo, thus such conduct was unlikely to recur. Our review of all the evidence leads us to the opposite conclusion. We do not agree with San Paolo's characterization of its wrong as "just

a business deal gone awry." "Trickery and deceit" are reprehensible wrongs, especially when done intentionally through affirmative acts of misconduct. *(TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 462.) We have no difficulty in independently concluding that the conduct of San Paolo's officer was reprehensible and that punitive damages were warranted in this case.

Nor can we so easily dismiss King's deceit as an isolated incident. It was continuous and intricate. King engaged not in one act of deception, as San Paolo urges, but in a pattern of deceit that continued into his trial testimony. He deceived not only Simon, but also Atha, concealing the Devogelaere deal, and leading Atha to believe he was still negotiating in good faith after the Devogelaere deal had already gone into escrow. Further, King never disclosed his agreement with Simon to Devogelaere. King deceived his own supervisor, as well, telling him that Simon had failed to produce financial records, without disclosing that he had refused to accept them.

After this action was filed, King filed two false declarations claiming to have had no communication with Devogelaere concerning the property until the evening of June 13. At trial, faced with his own telephone records, King claimed the declarations were true, although he should not have used the word, "communicate," because what he really meant was that he did not negotiate with Devogelaere.

King then came up with a palpably unbelievable story to support his claim that he did not negotiate with Devogelaere prior to the evening of June 13. King testified that Devogelaere dropped his offer off at his home that

evening, and he signed it the morning of June 14 at 8:00 a.m.[7] But the offer, made on a preprinted deposit-receipt form, was filled out in purple ink, dated June 12, 1996, in purple ink, and signed by both King and Devogelaere in purple ink, although King's signature was written in both blue ink and purple ink, one signature directly over the other. King initialed each page in blue ink. The date was changed from June 12, 1996 to June 14, 1996, by writing "14" over the "12." King claimed that the original date had been recorded wrong, and had to be changed; and that because the document had multiple copies, it was necessary to write over his signature to make it show on all of them. He also claimed that Devogelaere had left his purple pen with the document.

King testified that after he signed the document at 8:00 a.m., he drove four miles to Devogelaere's home in Pacific Palisades, dropped it in the mailbox, then drove to his office in downtown Los Angeles, arriving by 8:34 a.m. In fact, he had a telephone conversation in his office, before preparing a memorandum to his supervisor regarding the sale, who then prepared another memorandum, dated June 13, 1996, which was faxed to New York at 9:15 a.m. that morning, June 14, 1996. Simon had King's telephone records, showing that he made a call from his office at 8:34 a.m. Devogelaere admitted that it takes at least 35 minutes to reach downtown Los Angeles from his home, when there is no traffic, and up to 1 ½ hours with traffic. June 14, 1996, was a Friday.

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[7] King testified in deposition that he did not see the offer until June 14, but he changed that testimony by writing on the transcript that Devogelaere dropped it off at his home the evening of June 13, and that he did not look at it until the next day. In deposition, he testified he signed it at home on his dining-room table, but at trial, it was in his car.

We reject San Paolo's suggestion that King's false testimony may not be considered because it would amount to a sanction for litigation misconduct, instead of punishment for the conduct that precipitated the lawsuit. We agree that the defendant's behavior at trial may not be the basis of a punitive damage award. (*Cf. Zhadan v. Downtown L.A. Motors* (1976) 66 Cal.App.3d 481, 500-501.) On the other hand, lying to the trial court about the wrongful conduct may be considered in measuring reprehensibility. (Cf. *United Phosphorus, Ltd. v. Midland Fumigant, Inc.* (10th Cir. 2000) 205 F.3d 1219, 1230.) Concealment of evidence of fraudulent intent is reprehensible, and may be a factor supporting an award of punitive damages even where the injury is economic. (See *BMW*, *supra*, 517 U.S. at p. 579.) Further, King's false testimony was more than litigation misconduct. It showed how he manipulated the parties and documents at the time of the events in mid-June 1996 in order to support his false claim that he complied with the terms of the letter of intent, and its claim that it was Simon who failed to perform. King's deception at trial served to demonstrate just how false he was prior to trial, and thus, how reprehensible his conduct was.

We also reject San Paolo's assertion that it is unlikely to engage in similar wrongdoing in the future because King is no longer employed by San Paolo. San Paolo did not terminate Kings employment, or distance itself in any way from King's conduct. King was never reprimanded, warned, or counseled; he suffered no job or salary action whatsoever, and even got a bonus that year. It is far from certain that San Paolo will change its policies to discourage similar conduct in the future.

San Paolo suggests that the facts of this case are comparable to those of *BMW*, because there, a single concealment of fact did not "justify a significant sanction."

(See *BMW*, *supra*, 517 U.S. at p. 576.) The circumstances of *BMW* are hardly comparable to the facts of this case. In *BMW*, the plaintiff had purchased a new *BMW* automobile for approximately $40,000. After the car's arrival in the United States, but prior to its delivery to the state of purchase, the distributor repainted several parts of the body of the car, but did not disclose this fact to the dealer or the plaintiff, because the cost of the repair was less than three percent of the car's suggested retail price, and the manufacturer had adopted a nationwide policy of nondisclosure of minor repairs to cars damaged in the course of manufacture or transportation. (*BMW*, *supra*, 517 U.S. at p. 563.) The policy was consistent with the disclosure requirements of a significant number of states, where the omission would not have been actionable at all. (See *BMW*, supra, at pp. 569- 573.) The Court acknowledged that a greater sanction would be warranted in cases where the injury, albeit economic only, is inflicted intentionally through affirmative acts of misconduct. (*BMW*, *supra*, 517 U.S. at p. 576.)

San Paolo also seeks to draw an analogy with the facts of *FDIC v. Hamilton* (10th Cir. 1997) 122 F.3d 854, where mitigating factors considered by the federal court included the fact that the fraud was a "single contractual event," even though the scheme took some time, that the act was nonviolent, and the injury was purely economic. (122 F.3d at p. 862.)[8] In such a case, the court held, "the permissible ratio of punitive damages to actual damages should be relatively modest." (*Ibid.*) The court reduced the punitive damages

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[8] San Paolo also relies upon an unpublished California case, without compliance with California Rules of Court, rule 977. (See e.g., *Cates Construction, Inc. v. Talbot Partners* (1997) previously published at 53 Cal.App.4th 1420, superseded by *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28.) We shall disregard the reference.

from a ratio of 27 times actual damages to a ratio of six to one. (*Ibid.*) San Paolo contends that because of similar mitigating factors, punitive damages in this case should not exceed 10 times the award of compensatory damages, and since the punitive damage award of $1,700,000 was 340 times the compensatory award, it must be reversed.

Simon was awarded only his out-of-pocket expenses of $5000, pursuant to Civil Code section 3343, subdivision (a)(1). Ordinarily, one who has been fraudulently induced to enter into an unenforceable contract may recover the benefit of the bargain, as well as out-of-pocket expenses. (*Lazar v. Superior Court*, *supra*, 12 Cal.4th at p. 638.) On the other hand, a defrauded purchaser of real property, who does not succeed in acquiring the property, may recover only his or her out-of-pocket losses, not benefit-of-the-bargain damages. (*Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 54; Civ. Code, § 3343.) That does not mean that Simon did not suffer injury due to the loss of his bargain. Simon agreed to purchase the building for $1,100,000. His expert appraised the building's value as $1,500,000, as had San Paolo's expert before the action was filed. Simon's loss was at least the $400,000 difference between the appraised value and the price at which King falsely promised to sell the building.[9]

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[9] Simon also lost a unique opportunity. Small office buildings rarely come on the market in the location of the subject five-story office building, and Simon found it to be perfect for his paper and printing business, partly because it would enable him to compete better with the large suppliers like Staples, Office Depot, and Xerox. The building itself was also ideal, because it had a finished basement with a large, industrial-size freight elevator, which he found to be perfect for his warehouse. He planned to use the second floor, and lease out the top three floors, which had fancy improvements, making them attractive to potential tenants.

It is not possible to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." (*BMW*, *supra*, 517 U.S. at p. 560.) A punitive damage award four times the compensatory damages and 200 times the out-of-pocket expenses has been held, under the facts of that case, to be "close to the line." (*Pacific Mutual Life Insurance Co. v. Haslip* (1991) 499 U.S. 1, 23.) In *TXO Production Corp. v. Alliance Resources Corp.*, *supra*, a ratio of 10 times the potential harm to plaintiffs was not so 'grossly excessive' as to violate due process, although it was 526 times greater than the actual damages awarded by the jury. (See 509 U.S. at pp. 443, 460; see also, *BMW*, *supra*, 517 U.S. at p. 582.)

In challenging the 340:1 ratio, San Paolo relies upon its own assumption that the law requires a comparison of the actual amount awarded by the jury as compensatory damages, with the amount of the punitive damage award. Contrary to San Paolo's assertion, there is no requirement that the proportionality of punitive damages must be measured solely by the actual award of compensatory damages. Although the compensatory damage award is usually a convenient measure, it may or may not reflect the actual harm suffered. (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1603-1604.) "Thus, to meaningfully apply the 'reasonable relation' rule, the trier of fact (and reviewing court) should not focus on some bottom-line amount of an award of compensatory damages but on the nature and degree of the actual harm suffered by the plaintiff." (*Id.* at p. 1604; *Carr v. Progressive Casualty Ins. Co.* (1984) 152 Cal.App.3d 881, 892; cf *Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 541; but see *Auerbach v. Great Western Bank* (1999) 74 Cal.App. 4th 1172, 1190 [expenditures required by law are not damages, and may not be considered in awarding punitive damages].)

Although the United States Supreme Court in *BMW* recognized the value of a comparison with the actual award of compensatory damages, the guidelines call for a comparison with the actual harm suffered. (See *BMW*, *supra*, 517 U.S. at pp. 581-582.) Indeed, in *TXO Production Corp. v. Alliance Resources Corp.*, *supra*, the Supreme Court approved the consideration of the potential harm that would have been caused had a wrongful plan succeeded, and even "the possible harm to other victims that might have resulted if similar future behavior were not deterred." (509 U.S. at p. 460.) Thus, it is appropriate to consider not only the harm that actually has occurred, but also all the harm that is likely to result from the defendant's conduct. (*Pacific Mutual Life Insurance Co. v. Haslip*, *supra*, 499 U.S. at pp. 21-22.)

In *BMW*, the Court explained: "Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach." (*BMW*, *supra*, 517 U.S. at pp. 582-583.)

We are not, therefore, limited to comparing the punitive damage award with the award of out-of-pocket expenses. The actual harm to Simon included the loss of a valuable asset worth $400,000. Thus the ratio of punitive damages to actual harm is not 340 to 1, but just over 4 to 1. Given the intentional acts of affirmative deception practiced by San Paolo's officer, we find such a ratio to be "within a constitutionally acceptable range." (See *BMW*, *supra*, 517 U.S. at p. 583.)

The third *BMW* factor that we consider is the difference between the punitive damages remedy and the civil penalties authorized or imposed in comparable cases. (*Leatherman, supra*, 532 U.S. at p. ____, 121 S.Ct. at pp. 1684-1685; *BMW, supra*, 517 U.S. at p. 574.) San Paolo did not address *BMW's* third guideline in its opening brief, and has even objected to a comparison of the award to civil penalties provided for deceptive trade practices and perjury, on the ground that the elements of such offenses were not charged or established. At most, San Paolo contends, the punitive damage award should be compared to the $2,500 civil penalty provided by Business and Professions Code section 17206 for an instance of unfair competition. Although the comparison calls for a consideration of analogous wrongs, not merely charged and proven wrongs, the violation of common law tort duties do not easily lend themselves to a comparison with statutory penalties. (*Continental Trend Resources, Inc. v. OXY USA, Inc.* (10th Cir. 1996) 101 F.3d 634, 641, cert. den., 520 U.S. 1241 (1997).)

The purpose of the comparison is to determine whether the defendant had fair notice that its conduct would be subject to a large punitive-damage award. (*BMW, supra*, 517 U.S. at p. 584.) Absent analogous civil penalties, fair notice of the consequences of fraud may be inferred through comparison with criminal penalties, including imprisonment, for such felonies as Penal Code section 182, subdivision (a)(4), conspiring "to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises"; and Penal Code section 484, subdivision (a), "knowingly and designedly, by any false or fraudulent representation or pretense, defraud[ing] any other person of money, labor or real or personal property. . . ." (*Neibel v. Trans World Assur. Co.* (9th Cir. 1997) 108 F.3d

1123, 1131.)

Civil Code 3294, subdivision (a) provides notice that punitive damages are recoverable for fraud, and the availability of prison terms for fraudulent conduct provides notice that the penalty can be severe. (*Neibel v. Trans World Assur. Co.*, *supra*, 108 F.3d at p. 1131.) Further, substantial punitive damage awards have been a reality in fraud cases for many years (e.g., *Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 989, 996), and have been upheld by the United States Supreme Court. (See e.g., *Pacific Mutual Life Insurance Co. v. Haslip*, *supra*, 499 U.S. at pp. 5-6.) Our consideration of the third *BMW* factor leads us to conclude that San Paolo had fair notice that intentional, affirmative acts of fraud may lead to a sizeable punitive damage award.

While we might agree with San Paolo that the award was unusually large, our task has not been to discard the judgment of the jury in order to substitute our own. (See *Leatherman*, *supra*, 532 U.S. at p. ___, 121 S.Ct. at p. 1687, fn. 12.) It has been to determine de novo whether the award is so grossly disproportional to the gravity of the wrong as to violate due process. (*Id.* at p. 1684.) Having undertaken such a review, we conclude that it was not.

6. *The Award Is Not So Disproportionate As To Suggest Passion Or Prejudice Under California Law*

San Paolo also challenges the award as excessive under California law. Under California law, the essential question is whether the amount of the award substantially serves the societal interest in punishing the wrongdoer and deterring similar misconduct; and the answer to that question is obtained by considering three factors: the reprehensibility of the defendant's conduct; the relationship between the

punitive damage award and the harm done; and the amount of the punitive damage award in proportion to the defendant's wealth. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.)[10]

Awarding punitive damages in fraud cases furthers California public policy of punishing the defendant and making an example of him, in order to discourage him and others from perpetrating fraud in the future. (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App. 3d 1220, 1258; Civ. Code, § 3294, subd. (a).) If the award exceeds the amount needed to accomplish that goal, an appellate court can infer that the jury acted out of passion and prejudice. (*Id.* at p. 1259.) When the award is grossly disproportionate to the statutory objective, a presumption arises that it resulted from passion and prejudice. (*Neal v.*

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[10] San Paolo contends that Simon's counsel "invited error" in his closing argument by ignoring the first two "prongs of the test" and arguing "almost exclusively on the wealth of San Paolo." Its reasoning is somewhat difficult to follow, since the doctrine of invited error estops an appellant who has induced the commission of error, from asserting it as a ground for reversal. (See 9 Witkin, Cal. Proc. (4th ed. 1997) Appeal, § 383, p. 434.) It is not a ground for reversal. (See 2 Witkin, Cal. Evidence (3d ed. 1986) § 1371, p. 1335.) Apparently, San Paolo is contending that Simon was required to include a discussion of all three *Neal* factors in his closing argument, without emphasizing one over the other, and that he was prohibited from suggesting a particular amount that the jury should award. San Paolo has cited no authority for its assertions, not even general authority concerning the limitations placed on argument, and even if we assume that it was misconduct for counsel to suggest an amount or to fail to emphasize all three *Neal* factors equally, San Paolo does not claim to have objected to the argument or to have requested an admonishment. We therefore pass on these contentions without consideration. (See *Horn v. Atchison, T. & S.F. Ry. Co., supra*, 61 Cal.2d at p. 610.)

Farmers Ins. Exchange, *supra*, 21 Cal.3d at p. 928.)

The first two *BMW* guidelines are identical to the Neal factors, and serve the same purpose as California's criteria. (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1160-1163.) We have reviewed them under the stricter standard for purposes of the Fourteenth Amendment, and we have concluded that the award is not grossly disproportional to the gravity of the wrong and the harm done. We therefore need not review them again under the more deferential California standard enunciated in *Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal.3d at pages 928-929. Based upon our due process discussion, we conclude that the award was not so grossly disproportionate to the degree of reprehensibility or to the harm done, as to raise the presumption that it was the result of passion and prejudice.[11] We therefore turn to the issue of San Paolo's wealth.

"Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence . . . , will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. . . . By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter.' [Citation.]" (*Adams v. Murakami*,

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[11] We also note that the issue was tried to two juries. The first jury awarded $2,500,000 in punitive damages. The second jury awarded $1,705,000, a substantially reduced sum. When two different juries arrive at similar punitive damage awards, it indicates that the award is not the result of passion or prejudice. (See *Davis v. Merrill Lynch, Pierce, Fenner & Smith* (8th Cir. 1990) 906 F.2d 1206, 1225, fn. 22.) We draw a similar conclusion here, where the second award was still nearly $2 million dollars.

supra, 54 Cal.3d at p. 110, citing *Neal v. Farmers Ins. Exchange*, *supra*, 21 Cal.3d at p. 928.)

We review the jury's determination of the extent of the defendant's wealth for substantial evidence. (*Egan v. Mutual of Omaha Ins. Co.*, *supra*, 24 Cal.3d at p. 821.) Substantial evidence supports a finding that San Paolo's net worth was between $40,000,000 and $50,000,000. Bob Wurster, an officer of both San Paolo and its parent and sole shareholder, San Paolo Bank, testified that at the end of 1996, the net assets of San Paolo were approximately $46,000,000; and that at the end of the first trial the net assets of San Paolo were approximately $55,000,000. At less than five percent of San Paolo's net worth, the punitive damage award was not excessive on its face, without evidence that such a sum would cause such undue hardship as to render the punishment unreasonably disproportionate to San Paolo's ability to pay. (See *Adams v. Murakami*, *supra*, 54 Cal.3d at pp. 111-112.) It was San Paolo's burden to make such a showing. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1167.)

San Paolo did not make such a showing, and does not contend here that the amount is unreasonably disproportionate to its ability to pay. It contends in its reply brief, for the first time, that the trial court should have excluded evidence that after the first trial, San Paolo transferred $40,000,000 to the bank.[12] Without such evidence, it reasons, its net worth was shown at the time of the second trial to be only $4,875,000,

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[12] Wurster admitted that the transfer had been made after the first jury awarded punitive damages. He also admitted that he had attended the first trial, and knew that punitive damages would be the issue in the second trial.

which would not justify an award of $1,700,000, since punitive damages awards are generally limited to 10 percent or less of the defendant's net worth. (See *Weeks v. Baker & McKenzie*, *supra*, 63 Cal. App.4th at p. 1166.)

Ordinarily, a contention made for the first time in an appellant's reply brief may be disregarded, unless some meritorious reason is shown why it was not made in the opening brief. (*Monk v. Ehret* (1923) 192 Cal. 186, 190.) That rule is inapplicable if the new point is raised in order to address a contention in respondent's brief. (See *Fratessa v. Roffy* (1919) 40 Cal.App. 179, 188.) In his respondent's brief, Simon discussed the guidelines set forth in *BMW*, *supra*, 517 U.S. at page 574, including the issue of the wealth of the defendant. The sum of Simon's statement on the subject was as follows: "The wealth of a defendant must also be considered. [Citation.] San Paolo's wealth was appropriately considered to be $40,000,000 to $50,000,000. The jury could rightfully reject San Paolo's poverty plea based on its substantial liquid net worth and the questionable timing of the transfer of that net worth to the parent company."

We need not consider whether Simon's statement opens the door to a contention that the trial court should have excluded evidence of the transfer of assets, because once again, San Paolo fails to refer to its objection to the evidence, fails to refer to the trial court's ruling on its objections, and fails to refer to or discuss any testimony or other evidence to show how it was prejudiced by the evidence; and it fails to support its contention with applicable authority. We therefore deem the point abandoned. (See *Troensegaard v. Silvercrest Industries, Inc.*, *supra*, 175 Cal.App.3d at p. 228.)

7. *San Paolo Waived Any Error With Respect to BAJI No. 14.72.2*

San Paolo contends that the jury instruction in BAJI No. 14.72.2 is so vague that its right to due process was infringed by the use of it. San Paolo does not refer to its objection to the instruction, if any, in the trial-court record, or to any clarifying instruction it may have proposed. Our review of the record reveals that the parties jointly requested BAJI No. 14.72.2.

It is a long-established rule that one may not complain of instructions given to a jury at his own request. (Emerson v. County of Santa Clara (1871) 40 Cal. 543.) Further, a party may not complain on appeal about an instruction that was correct, but incomplete or vague, unless he requested an additional or clarifying instruction in the trial court. (*Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 9.) Since San Paolo does not contend that it requested an additional or clarifying instruction in the trial court, and we have found none in the record, San Paolo has not preserved this point for appeal, and we pass it without further consideration.

8. *San Paolo's Contentions Regarding California Law And Criminal Standards Are Too Vague To Address*

San Paolo's final contention appears to be that all California law relating to punitive damages is "constitutionally vague," and the imposition of punitive damages should be governed by the same standards that apply to criminal penalties.

A challenge to a statute as vague in its entirety usually involves a review of the words of the enactment, its

application in the particular case of the party challenging it, and finally, hypothetical applications of the law. (See *Village of Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 494-495, fn. 5.) San Paolo has made no effort to make such an analysis, and has not even identified the specific "California law" to which it objects, or which criminal standards should apply.

Simon has understandably made no attempt to address this contention in his respondent's brief, and we decline San Paolo's apparent invitation to address the subject of vagueness and constitutionality in the abstract, except to point out that in general, California's procedures for the imposition of punitive damages have been held to comply with constitutional requirements of due process. (See *Sierra Club Foundation v. Graham*, *supra*, 72 Cal.App.4th at pp. 1160-1163; *Las Palmas Associates v. Las Palmas Center Associates*, *supra*, 235 Cal.App.3d at p. 1258, fn. 8.)

II. *Simon's Cross-Appeal*

A. *Simon's Proposed Special Verdict Form Was Properly Refused*

The letter of intent signed by both parties provides, in part: "Seller and Buyer agree to exclusively negotiate upon execution of this letter." King admitted that San Paolo was bound by that term of the letter of intent, which prohibited him from negotiating, at least for 24 hours, with any other potential buyers.

Simon proposed a special verdict form that asked, "Did the defendant and plaintiff agree to exclusively negotiate with each other to complete the sale of the real property located at 816 South Figueroa Street, Los Angeles,

California?" Simon contends that the trial court erred in refusing this question in favor of the special verdict as given, which asked, "Was there a binding and enforceable agreement between [San Paolo] and [Simon]?"

As we have discussed in relation to San Paolo's appeal, the special verdict form used was ambiguous, and called for a legal conclusion. Simon did not object to it on either of those grounds, and does not object to it here on those grounds, and we consider them waived. (See *Brokaw v. Black-Foxe Military Institute, supra*, 37 Cal.2d at p. 280.)

Whether to allow a more or less detailed special verdict form was within the trial court's discretion. (See *Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal. App.4th 1467, 1487.) A trial court abuses its discretion if the special verdict form fails to dispose of all elements of the cause of action. (*Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 854-855.) As ambiguous as it was, the form that was used did not fail to dispose of the contract cause of action, and the proposed question regarding negotiation was subsumed in it. Had the jury found an enforceable agreement to negotiate exclusively with Simon, it would have properly answered that there was, in fact, an enforceable agreement.

The burden is on a party complaining of the trial court's exercise of discretion to show a clear case of abuse. (*Denham v. Superior Court, supra*, 2 Cal.3d at p. 566.) Further, Simon was required to show that any abuse was "sufficiently grave to amount to a manifest miscarriage of justice. . . [Citation.]" (*Mission Imports, Inc. v. Superior Court, supra*, 31 Cal.3d at p. 932.) The jury found there was no enforceable contract. Simon has not suggested how the result would have been different if the jury had been asked more specifically whether there was a contract to negotiate

exclusively. Nor has Simon provided any authority for his contentions. We therefore deem the point waived. (See *Troensegaard v. Silvercrest Industries, Inc., supra*, 175 Cal.App.3d at p. 228.)

B. *Jury Instructions*

Simon contends that if several jury instructions had not been refused by the trial court, the jury might have found the letter of intent, or at least part of it, to be an enforceable contract. A letter of intent that contains all essential terms may constitute an enforceable contract, depending on the parties' intent and their expectations. (See *California Food Service Corp. v. Great American Ins. Co.* (1982) 130 Cal.App.3d 892, 897.) Also depending upon the intent of the parties, a detailed letter of intent may be an agreement to negotiate in good faith. (See *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1033.)

"A party is entitled upon request to correct, non-argumentative instructions on every theory of the case advanced by him which is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case. [Citations.]" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.)

To determine whether a theory is supported by substantial evidence we reverse the usual rule of appellate review, and review the evidence in the light most favorable to the appellant, in this case, the cross-appellant, Simon. (See *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674.) Applying that standard, we agree that substantial

evidence supports the formation of a contract.[13]

After several months of on-again, off-again negotiation, San Paolo agreed to sell Simon the property located at 816 South Figueroa, for $1.1 million. Atha drafted a two-page letter of intent, which set forth all the terms that the parties had negotiated regarding the sale of the building. The first sentence of the draft letter of intent stated, "Due to the motivation of both parties and the anticipated short escrow, the following shall serve as a binding Letter of Intent for purpose of entering escrow. . . ."

On June 12, 1996, after the parties agreed to a few changes, Atha faxed to Simon a final version of the letter of intent, containing more than sixteen terms, with King's signature already affixed. One of the changes was made without Simon's knowledge: King had instructed Atha to remove the word, "binding," from the first sentence. It was still Simon's understanding, however, that the letter of intent would be a binding contract, and that it contained all the essential terms of their contract. He was told that the only terms left to negotiate were "housekeeping" terms, which would be addressed in the escrow.[14]

Atha testified that he also thought the letter of intent

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[13] San Paolo devotes substantial energy to arguing that there was substantial evidence showing that the letter of intent was merely an agreement to agree (see *Autry v. Republic Productions, Inc.* (1947) 30 Cal.2d 144, 151), and that the parties did not intend to be bound until they signed a deposit receipt. (See *Gavina v. Smith* (1944) 25 Cal.2d 501, 504.) Whether substantial evidence supports the judgment is not, however, our inquiry; rather, it is whether substantial evidence supports the requested instruction. (*O'Meara v. Swortfiguer* (1923) 191 Cal. 12, 15.)

[14] He did not say who told him.

was to be a binding contract, once it was approved by New York and escrow was opened, and he thought that it reflected all the essential terms of the parties' agreement.[15] Even though he took the word, "binding," out of the final draft at King's request, and described it on the cover sheet as "nonbinding" when he taxed Simon a copy of the fully executed letter of intent, he interpreted "nonbinding" as meaning only that the agreement was subject to approval by San Paolo's New York office, and the opening of escrow.[16] The letter of intent stipulated that escrow was to open upon approval of the terms and conditions of the letter of intent by San Paolo's Los Angeles and New York offices, which would be given no later than 3:00 p.m. the next day. The evening of the day that the letter of intent was signed by both Simon and King, Atha told Simon, "We have a deal. Go home, sleep like a baby." King testified that although he did not intend the letter of intent to be binding, he considered himself bound by the promise not to negotiate with others.

We turn first to Simon's contention that since all parties intended to be bound by the letter of intent's exclusive-negotiation term, substantial evidence supports the existence of an agreement to negotiate in good faith, and the court should have given his proposed instruction on that issue.

That proposed instruction reads as follows: "A duty of good faith and fair dealing may exist even in an agreement that is not binding. Even if you determine that the letter of

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[15] Atha changed this testimony in the second trial, claiming to have discussed the change to a non-binding letter of intent with Simon.

[16] Simon received that fax after the letter of intent was fully executed, and did not read the cover sheet or notice that it contained the word, "nonbinding."

intent was not binding on the defendant to sell the subject property, you are not precluded from finding that the letter of intent was an agreement to use best efforts or to negotiate in good faith. If you determine that the letter of intent was an agreement to use best efforts or to negotiate in good faith to complete a sale of the property, and you further determine defendant failed to negotiate in good faith or to use best efforts to complete the sale or that the defendant breached the term of the agreement to exclusively negotiate with plaintiff, you may determine that here was breach of the implied covenant of good faith and fair dealing resulting in a breach of contract."

The determination of whether there existed an agreement to negotiate in good faith is made according to the ordinary rules of contract. (See *Racine & Laramie, Ltd. v. Department of Parks & Recreation, supra*, 11 Cal.App. 4th at pp. 1033-1035.) The jury in this case was properly instructed on the rules of contract formation. Instructions that are cumulative or merely amplifications of other instructions should not be given. (*Hicks v. Ocean Shore Railroad, Inc.* (1941) 18 Cal.2d 773, 783.)

"Formula instructions," such as that proposed by Simon, are properly refused, unless they are reasonably brief and concise, and are accurate statements of the law, understandable to the average juror. (See *Dodge v. San Diego Electric Ry. Co.* (1949) 92 Cal.App.2d 759, 763-764.) The proposed instruction is neither brief nor concise, and contains the misleading statement that "[a] duty of good faith and fair dealing may exist even in an agreement that is not binding," implying that a duty to negotiate in good faith may exist even in the absence of one or more elements of contract. In fact, an agreement to negotiate in good faith must meet the requisites of an enforceable contract. (Racine & Laramie, Ltd. v.

Department of Parks & Recreation, supra, 11 Cal.App.4th at p. 1033.) The trial court properly refused the instruction, and was not obligated to modify it or propose another in its place. (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 717.)

Relying on *Jacobs v. Tenneco West, Inc.* (1986) 186 Cal.App.3d 1413, and Jacobs v. Freeman (1980) 104 Cal. App.3d 177, Simon also contends that since substantial evidence supported the formation of a contract, subject to the approval of San Paolo's senior management in Los Angeles and New York, the jury should have been instructed as to San Paolo's obligation to seek such approval in good faith. Simon contends that if the jury had been instructed as to San Paolo's obligation to exercise good faith in seeking approval, it might have found the letter of intent to be an enforceable contract.

In *Jacobs v. Freeman*, the parties' contract contained an express provision similar to one in the letter of intent, conditioning the opening of escrow upon approval by the seller's board of directors. The court of appeal reversed a nonsuit, holding that the provision was intended to be a condition precedent to the seller's duty to convey title to the land rather than a condition precedent to the formation of a contract. (104 Cal.App.3d at p. 189.) The implied covenant of good faith and fair dealing required the seller's officers to submit the contract to the board of directors, and their failure to do so was a breach of contract. (*Id.* at pp. 189-190.)

Jacobs v. Tenneco West involved the same parties as in *Jacobs v. Freeman*. The seller appealed an adverse judgment upon retrial, contending that the buyer had failed to prove that it had acted in bad faith in failing to submit the contract to the board. (*Jacobs v. Tenneco West, Inc.*, *supra*, 186 Cal.App.3d at p. 1415, 1418.) The court held that since

the buyers did not assume the risk of lack of cooperation, and the lack of cooperation was not shown to be justifiable, the seller bore the burden to establish that its failure did not contribute materially to the nonoccurrence of the condition. (*Id.* at p. 1418.) When seller then responded that the board would not have approved the contract in any case, the court held that such an excuse for nonperformance is an affirmative defense, upon which the seller had the burden of proof. (*Id.* at p. 1419.)

Here, San Paolo interposed no such affirmative defense. In his closing statement, however, its counsel argued that even if the parties intended the letter of intent to be a binding contract, it was unenforceable because conditions were not met, including the requirement of approval from New York, and the opening of escrow, which was, in turn, conditioned upon approval from New York. Nevertheless, King admitted that he never submitted the letter of intent or Simon's offer for approval. Further, although San Paolo's approval procedure required the recommendation of King's supervisor, William Schack, then the submission of a written memorandum to one of two officers in New York, King never submitted anything to them, and never asked for Schack's recommendation.

Simon contends that under the rationale of the two *Jacobs* holdings, San Paolo was estopped to argue that the sale was not or would not have been approved by New York. But Simon did not object to counsel's argument; nor did he seek a ruling from the trial court on his estoppel theory. Instead, he proposed four lengthy, rambling, argumentative, and confusing instructions, and an instruction on the implied

covenant of good faith and fair dealing.[17]

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[17] Proposed instruction number 4 reads in part: "In this case, the agreement between plaintiff and defendant gave defendant the right to seek written approval of the . . . New York offices . . . If you determine that (1) the defendant sought written approval . . . and (2) that the senior officers rejected the terms and conditions of the contract reasonably and in good faith, you may determine that the contract is not enforceable. However, if you determine that the defendant failed to seek written approval .... the condition is excused . . . and may be determined by you not to prevent the formation of a binding contract . . ." Number 5 states: "If you determine that the individuals negotiating with the plaintiff . . . had an obligation to seek approval from . . . New York . . ., you must determine that such individuals had a duty to submit the contract with a recommendation of approval. If you find that they did not recommend approval of the terms of the contract . . ., you may determine that their failure was an unreasonable prevention of the performance of the condition which excused the condition if you also determine that the failure to recommend the terms and conditions of the Letter of Intent contributed materially to the failure to obtain such approvals, you may conclude that there was a breach of the contract." Number 6 reads: "Under the terms of the contract, defendant was obligated to open escrow and attempt to complete the sale of the property only if the terms and conditions of the letter of intent were approved, in writing, by . . . New York

. . . However, the implied covenant of good faith and fair dealing also required defendant to make reasonable efforts to obtain the approval . . . , and if it failed to do so, the law does not permit it to take advantage of that failure to avoid an obligation to sell the property. Consequently, if the failure to obtain written approval . . . was caused by defendant's failure to make reasonable efforts to obtain such approval, then the defendant is obligated to plaintiff in the same manner as if the senior officers had approved ... the letter of intent." Number 7 states: "If you find that the defendant made reasonable efforts to obtain such approval, you may find that [it] had no obligation under the contract to sell the property. On the other hand, if you find that the defendant failed to make reasonable efforts to obtain the approval . . . , you must find that [it] is obligated to plaintiff in the same manner as if they obtained such approval. Unless defendant proves, by a preponderance of the evidence,

The form of the proposed instructions alone justified their refusal. (See *Dodge v. San Diego Electric Ry. Co.*, *supra*, 92 Cal.App.2d at pp. 763-764.)

The proposed instructions are also ambiguous. On the one hand, they appear to assume that New York's approval was a condition precedent to the formation of a contract. At the same time, the proposed instructions appear to instruct the jury to assume that a contract had been formed, and San Paolo's performance was conditioned upon New York approval.

A covenant of good faith and fair dealing is implied in all contracts. (See *Universal Sales Corp. v. California etc. Mfg. Co.* (1942) 20 Cal.2d 751, 771.) On the other hand, it is not implied if no contract has been formed, and does not require a party to enter into a contract. (*Racine & Laramie, Ltd v. Department Of Parks & Recreation*, *supra*, 11 Cal.App.4th at p. 1032.) Neither *Jacobs v. Freeman*, nor *Jacobs v. Tenneco West* held otherwise. In those cases, there was no issue concerning the formation of a contract. There, an executory bilateral contract to sell the land had been created, obligating the seller to convey land upon board approval. (*Jacobs v. Freeman*, *supra*, 104 Cal. App.3d at p. 187.) Board approval was not a condition precedent to the formation of the contract. (*Jacobs v. Tenneco West, Inc.*, *supra*, 186 Cal.App.3d at p. 1415.) Thus, to the extent the instructions suggest that San Paolo was required by the covenant of good faith and fair dealing to bring about a condition precedent to the formation of the contract, they are

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that the senior officers would not have given its approval, even if they had made reasonable efforts to obtain such approval, you may determine that defendant is deemed to have approved the terms and conditions of the letter of intent."

not supported by those authorities, and they were incorrect.

Further, since San Paolo did not interpose the affirmative defense of excuse of a condition precedent to its performance, the court was not required to instruct as to the burden of proof discussed in Jacobs v. Tenneco West, Inc., supra, 186 Cal.App.3d at pages 1418-1419. Thus, the trial court properly refused the entirety of the instructions, and had no duty to cull out what was proper, modify them, or give others in lieu of them. (See Fibreboard Paper Products Corp. v. East Bay Union of Machinists, supra, 227 Cal. App.2d at p. 717.)

DISPOSITION

The judgment is affirmed.[18] Each party shall bear its own costs on appeal.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

EPSTEIN, Acting P.J.

CURRY, J.

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[18] Since we affirm the judgment, we also deny San Paolo's motion for restitution of payment of judgment.

APPENDIX B

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

LIONEL SIMON, DBA LIBERTY PAPER COMPANY,

Plaintiff, Respondent and Cross-Appellant,

v.

SAN PAOLO U.S. HOLDING COMPANY, INC.,

Defendant, Appellant and Cross-Respondent.

B121917

(Super. Ct. No. BC152431)

COURT OF APPEAL SECOND DISTRICT
FILED
AUGUST 28, 2000
JOSEPH A. LANE CLERK

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard P. Kalustian, Judge. Affirmed.

Epport & Richman, Lawrence A. Abelson, Beth Ann R. Young and Steven N. Richman for Defendant, Appellant and Cross-Respondent.

Knapp, Petersen & Clarke, Andre E. Jardini, Mitchell B. Ludwig and Kevin J. Stack for Plaintiff, Respondent and Cross-Appellant.

BACKGROUND

On June 21, 1996, cross-appellant, Lionel Simon, commenced this action against San Paolo Bank (hereinafter "the bank") and appellant, San Paolo U.S. Holding Company, Inc. ("San Paolo").[1] Simon sought specific performance of an alleged contract to purchase real property, located at 816 Figueroa Street in Los Angeles. He also sought damages for breach of the contract, as well as damages for fraud, consisting of a false promise to sell the property to Simon under certain terms and conditions.

The issues of liability and punitive damages were tried separately by jury, beginning on August 1, 1997.[2] By special verdict rendered on August 12, 1997, the jury found that there had been no enforceable contract between the parties. However, the jury found in favor of Simon on the fraud cause of action, awarded him $5000 in compensatory damages, and $2,500,000 in punitive damages.

San Paolo brought motions for a new trial, a reduction in punitive damages, and judgment notwithstanding the verdict. Simon brought a motion for new trial as to damages. The trial court denied Simon's motion, as well as San Paolo's motion for judgment notwithstanding the verdict. The trial court granted San Paolo's motion for new trial, subject to Simon's acceptance of a reduction in punitive damages to $250,000. Simon refused to accept the

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[1]San Paolo Bank, the parent company of San Paolo U.S. Holding Company, was eliminated as a defendant after its motion for summary judgment was granted. We affirmed the judgment entered in its favor in case No. B 113208, filed May 21, 1998.

[2]San Paolo states in its opening brief that a pretrial summary adjudication eliminated the specific performance count and one of two contract counts. Simon responds that the summary judgment eliminated a cause of action for tortious breach of the covenant of good faith and fair dealing, not a contract claim. However, neither the motion nor the order granting it has been made a part of the record on appeal.

remittitur, and the issue of punitive damages was tried to a new jury, beginning March 6, 1998.

The second jury assessed punitive damages in the amount of $1,700,000, and San Paolo's motion for new trial was denied. On April 8, 1998, judgment was entered against San Paolo in the amount of $1,705,000. San Paolo filed a timely notice of appeal from the judgment, and Simon filed a timely notice of cross-appeal.

DISCUSSION

I. San Paolo's Appeal

A. The First Trial

We leave our summary of the evidence adduced at the first trial to our discussion of Simon's cross-appeal because, although San Paolo contends that there was no substantial evidence to support any of the elements of fraud, it refers only to evidence presented during the second trial, which involved just the issue of punitive damages. San Paolo's opening brief and reply brief have set forth none of the evidence presented at that first trial.

It is presumed that the record contains evidence to sustain every finding of fact, and it is the appellant's burden to demonstrate the absence of substantial evidence to support a challenged finding, by setting forth all the material evidence on the point. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; Cal. Rules of Court, rule 13.) Since San Paolo has failed to do so, we presume the evidence was sufficient to support the verdict, and deem the point waived. (See *Foreman & Clark Corp. v. Fallon, supra,* 3 Cal.3d at p. 881.)

San Paolo also contends that there was no liability for fraud as a matter of law, because the jury found there was no contract. San Paolo's contention appears to be based

entirely upon its interpretation of the special verdict finding that there was no "binding and enforceable agreement" between the parties. San Paolo infers that the jury found that no contract had been formed in the first instance. Thus, it reasons, Simon was not induced to enter into a transaction, and cannot be said to have relied upon the false promise.

However, the jury was never asked to determine whether a contract had been formed. Instead, it was asked to make the legal conclusion as to whether an enforceable contract existed. Further, the use of "and" instead of "or" to connect "binding" and "enforceable" indicates the jury may have found that a contract had been formed, but was not enforceable, or that no contract had been formed at all. It is impossible to discern from the special verdict which conclusion the jury made.

A special verdict must call for ultimate facts, not conclusions of law. (Code Civ. Proc., § 624; see 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 355, p. 404.) And it must state those facts directly, not by implication. (*Breeze v. Doyle* (1861) 19 Cal. 101, 103.) The special verdict in this case was defective, in that it called for a conclusion of law, which merely implied the facts upon which it was based. The jury's finding of fraud implies that it found that the parties did enter into a contract, but the contract was unenforceable. We cannot conclude that the jury found that no contract was formed in the first instance.

San Paolo is, in effect, inviting us to infer a contradictory finding, while rejecting a reasonable interpretation which would support the judgment. However, San Paolo has waived any error in the form of the special verdict, by failing to object. (*Brokaw v. Black-Foxe Military Institute* (1951) 37 Cal.2d 274, 280.) We therefore reject San Paolo's invitation.

A cause of action for promissory fraud requires proof of an unperformed promise, made about a material fact, without any intention of performing it, and with the intent to deceive the plaintiff or to induce him to enter into a transaction; and upon which the plaintiff justifiably relies to his injury. (*Muraoka v. Budget Rent-A-Car, Inc.* (1984) 160 Cal.App.3d 107, 119; Civ. Code, §§ 1572, subd. 4, 1709, 1710.) Liability does not depend upon whether the promise is ultimately enforceable as a contract. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) "'If it is enforceable, the [plaintiff] . . . has a cause of action in tort as an alternative at least, and perhaps in some instances in addition to his cause of action on the contract.' [Citation.]" (*Id.*at p. 638, quoting Rest.2d Torts, § 530, subd. (1), com. c, p. 65; and citing *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 29.)

San Paolo relies upon *Maynes v. Angeles Mesa Land Co.* (1938) 10 Cal.2d 587, 589, and Justice Clark's dissent in *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 832. Neither case touches upon the requirement, or lack of requirement, of an enforceable contract as an element of promissory fraud.[3] We therefore reject San Paolo's contention that there was no liability for fraud as a matter of law.

B. The Second Trial

We summarize the evidence in the light most favorable to Simon, as the prevailing party, and we give Simon the benefit of every reasonable inference and resolving conflicts

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[3]Indeed, *Egan* does not even involve a claim of promissory fraud. That portion of Justice Clarke's dissent to which San Paolo refers states merely that a careless mistake resulting from poor investigation is not malice, and does not support an award of punitive damages. (See 24 Cal.3d at p. 832.)

in support of the verdict. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)[4]

When Simon agreed to purchase from San Paolo the building located at 816 South Figueroa in Los Angeles for $1,100,000, he objected to a term in the seller's offer which would make the purchase agreement non-binding until close of escrow. San Paolo's broker, William Atha, agreed that the term was not normal, and prepared a draft letter of intent which stated that it would be binding. Although the draft letter of intent stated that it was binding, it also called for approval of the transaction by San Paolo's Los Angeles and New York offices, which was to be given no later than 3:00 p.m. on June 12, 1996.

In all, the draft letter of intent contained thirteen terms lettered A through M, including the price, terms of the financing to be provided, and deadlines for various acts. Simon agreed to Atha's suggestion to include a requirement that San Paolo negotiate only with Simon, so that "the rug didn't get pulled out again at the end," as it had been several times during the negotiations by Duane King, San Paolo's vice-president in charge of the sale of the building.[5]

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[4]Our summary differs significantly from San Paolo's, because San Paolo has chosen to draw all reasonable inferences in favor of its own position, and to disregard its obligation to set forth in its brief all the material evidence, not merely its own. (See *Foreman & Clark Corp. v. Fallon, supra,* 3 Cal.3d at p. 881.)

[5]On several occasions, King changed the terms of his offer after Simon had verbally accepted them. In April 1996, Simon asked King what it would take to buy the building, and King told him that if he offered $1,290,000, the bank would finance the property for him, and give him $40,000 improvement allowance. As soon as Simon agreed, King demanded $1,350,000, and offered a $75,000 allowance. When Simon agreed to those terms, King said he would take the offer to New York, but Simon never heard back from him. Later that month, Simon learned that the prior owners had a right of redemption in the property, with eight or nine more months to run. Simon was very concerned about

Atha worded the requirement as follows: "Seller and Buyer agree to exclusively negotiate upon execution of this letter." Simon was told that minor "housekeeping terms" would be worked out in escrow.

The next day, June 12, 1996, Atha sent the final letter of intent for Simon's signature. It contained a few additional terms, now lettered A through P, and the word "binding" had been removed. However, the last paragraph stated: "These terms and conditions are the essential elements of this transaction and any minor modifications or further instructions shall be identified and reflected in escrow in the escrow instructions." A new term requiring a deposit receipt had been added. Concerned that the deposit receipt would not conform to the terms of the letter of intent, Simon added a provision to allow his attorney to approve the deposit receipt and escrow instructions.

The final letter of intent moved back the deadline for approval by the Los Angeles and New York offices of San Paolo Bank, to June 13, 1996. Upon receipt of such approval in writing, Simon was to deposit $50,000 to open escrow. He was to make his financial statements available within twenty-four hours after execution of the letter of intent. Simon signed the final letter of intent, and it was sent to King for signature. Shortly past noon on June 12, Atha told Simon that King had signed it, and added, "We have a deal." Atha faxed the fully executed letter of intent to Simon that evening (although he dated the fax cover sheet, "6-11-96"), and in the subject line of the cover sheet, after

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the possibility of redemption, so he offered $1.1 million conditioned upon a six-month escrow. Atha told him King would agree to the long escrow, if he agreed to pay $1.2 million. However, when they met to close the deal, King changed his offer again, demanding to close escrow by June 28, 1996, unless Simon paid $1.35 million. Negotiations broke off until June 10, 1996.

the words, "Signed Letter of Intent," he wrote in parentheses the word, "nonbinding."

The very same day that he signed the letter of intent, King told Atha that the bank had refused to agree to allow Simon until June 26 to finish his inspections, but would approve it if he completed them by June 21. In fact, he had not talked to New York before making this new demand, and never sought approval of Simon's purchase from anyone with authority to give it in New York. When Simon did not agree to move the date up earlier than June 24, King instructed Atha to refuse to accept Simon's financial statements and deposit. King told his supervisor that Simon had failed to perform, but he did not disclose to him that he had refused to accept Simon's documents and deposit.

On June 12, 13, and 14, without Simon's knowledge, King had been in frequent telephone communication concerning the subject property, with Robert Devogelaere, a business acquaintance of King's, and a mutual client of San Paolo's outside counsel, Richard Scott, with whom King also had several telephone conversations during the same period. On June 13, King told Atha not to disclose to Simon that he had another offer, or that he was negotiating with another buyer.

Also on June 13, Simon retained attorney Donald Mitchell, who spoke to Atha and King in a conference call the same day, demanding that San Paolo comply with the agreement. That evening, King faxed Simon a letter stating that he was terminating negotiations with him. Simon found the fax the next morning, June 14, when he arrived at his office. Also on June 14, King obtained formal approval for a sale to Devogelaere, and escrow opened same day.

On June 17, 1996, without disclosing the Devogelaere deal, King agreed to accept June 26 as the deadline for Simon to complete his inspections, as called for in the letter

of intent, and offered to discount the purchase price by $5000, to defray Simon's inspection costs. However, later that day, he said he would need approval from Italy, and that he would accept only $1,500,000. Soon after that, both King and Atha stopped taking Simon's calls.

1. San Paolo has failed to show an abuse of discretion in denying its motions in limine to exclude evidence.

San Paolo contends that the trial court should have granted its motions in limine to exclude evidence of certain trust deeds and liens recorded after the sale of the property, as well as all testimony by Simon's expert, and any testimony relating to compensatory damages which were not awarded in the first trial. The trial court should have excluded the evidence, San Paolo reasons, because it "was inadmissible and likely misled or confused the jury as to the real issues in the case."

The only authorities cited in support of this assignment of error relate generally to a trial court's discretion under Evidence Code section 352. (See e.g. *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 36 ["The trial court is vested with the discretion to exclude evidence which may unduly consume time or confuse the jury"]; *Chyten v. Lawrence & Howell Investments* (1993) 23 Cal.App.4th 607, 619 ["The court could . . . properly conclude that . . . probative value was outweighed by factors supporting exclusion."].)

We infer from the cited authorities that San Paolo's contention is not really that the evidence was inadmissible per se, but that the trial court abused its discretion under Evidence Code section 352, in refusing to exclude it. The burden is on a party complaining of the trial court's exercise of discretion to show a clear case of abuse. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) An appellant may not carry this burden simply by inviting the appellate court to have a different opinion of the relevance of the

disputed evidence, as San Paolo has done here. (*Fontana Paving, Inc. v. Knecht, Garrison & Tait Associates, Inc.* (1965) 238 Cal.App.2d 724, 726.)

Not only is San Paolo required to demonstrate affirmatively an abuse of discretion, it is required to show that such abuse was " 'sufficiently grave to amount to a manifest miscarriage of justice . . . .' [Citation.]" (*Mission Imports, Inc. v. Superior Court* (1982) 31 Cal.3d 921, 932.) In making such a showing, it is the duty of a party to support its arguments with appropriate references to the record. (Cal. Rules of Court, rule 15(a).) San Paolo's references to the record are limited to the pages where its motions in limine are reproduced.

San Paolo fails to identify the exhibits or even to refer to the page numbers where we might find the evidence that it claims was admitted over its objection. Further, it fails to refer to the trial court's ruling on its objections, and it fails to refer to or discuss any testimony or other evidence to show how it was prejudiced by the unidentified trust deed and liens and unidentified testimony; and it fails to support its contention with applicable authority. We therefore deem this point abandoned. (See *Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228.)

2. *Malice, oppression, or fraud was established in the first trial*

Referring only to evidence adduced in the second trial, San Paolo complains Simon failed to establish fraud, oppression, or malice by clear and convincing evidence. San Paolo has apparently forgotten that by special verdict, the jury in the first trial expressly found, by clear and convincing evidence, that San Paolo had accomplished its fraud by means of fraud, oppression, or malice. The only issue in the second trial was the amount of punitive damages to be awarded.

3. San Paolo has not preserved misconduct issues for appeal

With no citation to authority, and very little argument, San Paolo contends that Simon's counsel made an improper closing argument, and provides six examples of comments which it contends to have been inflammatory, incorrect, misleading, or baseless.

Except in extreme cases, a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished. (*Horn v. Atchison, T. & S.F. Ry. Co.* (1964) 61 Cal.2d 602, 610.) San Paolo does not contend that it made any such objection or request, and our review of counsel's argument has turned up none.

A party is deemed to have waived misconduct unless "it was of such an egregious nature that it could not have been cured by a corrective instruction to the jury. [¶] . . . Only misconduct so prejudicial that an admonishment would be ineffective excuses the failure to request such admonishment. [Citation.]" (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 892.)

San Paolo contends that it refrained from objecting or requesting an admonition because "the trial court specifically instructed the parties not to object or otherwise interrupt the other side's closing argument." Thus, San Paolo reasons, it "did not have the opportunity to challenge . . . inappropriate argument at the time it occurred." The trial court gave no such instruction. In reality, the court admonished counsel that it did not want to hear objections based upon a claim that the evidence does not support the argument.

San Paolo suggests that because the statements by Simon's counsel were outrageous on their face, prejudice is obvious. Error is not presumed; it is the appellant's burden

to show that the error complained of has resulted in a miscarriage of justice. (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833.) "No judgment shall be set aside, or new trial granted, in any cause, . . . or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art.6, § 13.) A miscarriage of justice is shown only when it appears reasonably probable that a result more favorable to the appellant would have been obtained, were it not for the error. (*People v. Watson* (1956) 46 Cal.2d 818, 834-838.)

San Paolo has made no showing that a proper objection or request for admonishment would not have been effective. It has taken the alleged misconduct out of context, and not discussed the evidence in relation to counsel's argument. Indeed, the only references to the record are to counsel's statements. Thus, even if the failure to object or to request admonishment were excused due to the nature of the comments, San Paolo has utterly failed to demonstrate any prejudice from the comments.

4. Substantial evidence established that a corporate officer committed the act of oppression, fraud, or malice

San Paolo contends that because the fraud was committed by its employee, Simon was required to present some evidence relating to ratification, authorization, or advance knowledge of the employee's unfitness. In support of this contention, San Paolo relies upon the first sentence of Civil Code section 3294, subdivision (b): "An employer shall not be liable for [punitive] damages . . . based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights

or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice." San Paolo ignores the second sentence of subdivision (b) of Civil Code section 3294: "With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

The evidence established that San Paolo is a corporation, and King was an officer of the corporation, with authority to sell property on behalf of the corporation. Thus, the "act of oppression, fraud, or malice [was] on the part of an officer," satisfying the requirements of the statute.

5. The award did not violate due process

San Paolo contends that the punitive-damage award was so excessive as to violate its right of due process under the federal constitution. San Paolo also contends the award was so disproportionate as to be presumptively the result of passion and prejudice, when analyzed under the criteria established under California law.

Punitive damage awards which are grossly excessive in relation to a State's legitimate interests in punishing unlawful conduct and deterring its repetition, violate a defendant's right to due process, guaranteed under the Fourteenth Amendment. (*BMW of North America v. Gore* (1996) 517 U.S. 559, 568.)[6] The Supreme Court has

[6] Supreme Court decisions prior to *BMW* concerned the propriety of state procedures and the review necessary to ensure due process, but stopped short of formulating a test. (E.g., *TXO Production Corp. v. Alliance Resources Co.* (1993) 509 U.S. 443, 454-456; *Pacific Mutual Life Insurance Co. v. Haslip* (1991) 499 U.S. 1, 22.) California law affords the degree of procedural due-process protection required under *Haslip*. (See *Las Palmas Associates v. Las Palmas Center Associates*

suggested some "guideposts" in determining whether an award is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm and the punitive damages award; and the difference between the punitive damages remedy and the civil penalties authorized or imposed in comparable cases. (*Id.* at p. 574.)

Under California law, the essential question is whether the amount of damages awarded substantially serves the societal interest in punishing the wrongdoer and deterring similar misconduct; and the answer to that question is obtained by considering three factors: the reprehensibility of the defendant's conduct; the relationship between the punitive damage award and the harm done; and the amount of the punitive damage award in proportion to the defendant's wealth. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.)

The *BMW* guidelines are nearly identical, and serve the same purpose as California's criteria; thus, an award which passes muster under California's rules will satisfy the requirements for federal due process. (See *Sierra Club Foundation v. Graham, supra,* 72 Cal.App.4th at pp. 1160-1163.) Since San Paolo has not addressed *BMW's* third guideline, which suggests a review of civil penalties authorized or imposed in comparable cases, we shall analyze both contentions under the factors first set forth by the California Supreme Court in *Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d at page 928.[7]

(1991) 235 Cal.App.3d 1220, 1257, 1258, fn. 8.) *TXO* did not add to those requirements. (*Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15.) Thus, California's procedures are constitutionally sufficient after *TXO*, as well.

[7] Indeed, San Paolo has objected to Simon's attempt to compare the award to civil penalties provided for deceptive trade practices and

Awarding punitive damages in fraud cases furthers California public policy of punishing the defendant and making an example, in order to discourage the defendant and others from perpetrating fraud in the future. (*Las Palmas Associates v. Las Palmas Center Associates, supra,* 235 Cal.App.3d at p. 1258; Civ. Code, § 3294, subd.(a).) If the award exceeds the amount needed to accomplish that goal, an appellate court can infer that the jury acted out of passion and prejudice. (*Id.* at p. 1259.) When the award is grossly disproportionate to the statutory objective, a presumption arises that it resulted from passion and prejudice. (*Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d at p. 928.) To make that determination, we are guided by the three Neal factors which we have already enumerated. (See *id.* at p. 928.)

San Paolo calculates the proportion of punitive damages awarded to actual harm as 340/1. It contends that with a ratio of more than five to one, the award should be deemed excessive, requiring reversal. There is no fixed ratio of punitive damages to harm which results in a presumption of passion and prejudice; however, "even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. [Citation.]" (*Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d at p. 928.)

San Paolo's calculation of 340/1 is the proportion of punitive damages, $1,700,000, to Simon's out-of-pocket expenses of $5000, awarded pursuant to Civil Code section 3343, subdivision (a)(1). In calculating this ratio, San Paolo relies upon its own assumption that the law requires a comparison of the actual amount awarded by the jury as compensatory damages, with the amount of the

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perjury, on the ground that it has not been charged with such offenses, although there is nothing in *BMW* which would limit consideration of comparable civil and criminal penalties to charged offenses.

punitive damage award. As we shall explain, San Paolo's assumption is unfounded.

Ordinarily, one who has been fraudulently induced to enter into an unenforceable contract may recover the benefit of the bargain, as well as out-of-pocket expenses. (*Lazar v. Superior Court, supra,* 12 Cal.4th at p. 638.) However, a defrauded purchaser of real property, who does not succeed in acquiring the property, may recover only his or her out-of-pocket losses, not benefit-of-the- bargain damages. (*Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 54; Civ. Code, § 3343.)

That does not mean that Simon did not suffer injury due to the loss of his bargain. Simon agreed to purchase the building for $1,100,000. His expert appraised the building's value as $1,500,000, as had San Paolo's expert before the action was filed. Simon's loss was at least the $400,000 difference between the appraised value and the price at which King falsely promised to sell the building.[8]

Although the compensatory damage award is usually a convenient measure of the injury or damages suffered by a plaintiff, it may or may not reflect the actual harm the plaintiff has suffered. (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1603-1604.) "Thus, to meaningfully apply the 'reasonable relation' rule, the trier of fact (and reviewing court) should not focus on some

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[8]Simon also lost a unique opportunity. Small office buildings rarely come on the market in the location of the subject five-story office building, and Simon found it to be perfect for his paper and printing business, partly because it would enable him to compete better with the large suppliers like Staples, Office Depot, and Xerox. The building itself was also ideal, because it had a finished basement with a large, industrial-size freight elevator, which he found to be perfect for his warehouse. He planned to use the second floor, and lease out the top three floors, which had fancy improvements, making them attractive to potential tenants.

bottom-line amount of an award of compensatory damages but on the nature and degree of the actual harm suffered by the plaintiff...." (*Id.* at p. 1604; *Carr v. Progressive Casualty Ins. Co.* (1984) 152 Cal.App.3d 881, 892; cf, *Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 541; but see *Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, 1190 [expenditures required by law are not damages, and may not be considered in awarding punitive damages].)[9]

When the actual harm to Simon is considered, its ratio to punitive damages is not 340 to 1, but just over 4 to 1, not grossly disproportionate, without consideration of other factors, as to suggest passion or prejudice. Thus, we measure the reprehensibility of San Paolo's conduct against a ratio of 4 to 1, not 340 to 1.

Discussing only evidence favorable to its position, San Paolo contends that its conduct was not "particularly reprehensible," because it caused only nominal economic harm and was a single act. Further, since King is no longer employed by San Paolo, it contends that such conduct was unlikely to recur.

San Paolo misapprehends the scope of review. We must view the entire record for substantial evidence from which the jury could reasonably conclude that the acts of San Paolo reached the level of reprehensibility to justify the award. (*Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d at pp. 922, 927.) An appellate court's task is not to find

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[9]Nor does the Due Process Clause of the Fourteenth Amendment require comparison with a fixed ratio based upon the compensatory-damage award. "It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as . the possible harm to other victims that might have resulted if similar future behavior were not deterred." (*TXO Production Corp. v. Alliance Resources Corp., supra,* 509 U.S. at p. 460.)

evidence from which inferences may be drawn in the appellant's favor, as San Paolo has done, but "begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." (*Crawford v. Southern Pacific Co., supra,* 3 Cal.2d at p. 429.)

Substantial evidence not only supports the verdict, but also contradicts San Paolo's conclusion that the fraud was an isolated incident. King engaged not in one act of deception, as San Paolo urges, but in a pattern of deceit that continued into his trial testimony. He deceived not only Simon, but also Atha, concealing the Devogelaere deal, and leading Atha to believe he was still negotiating in good faith after the Devogelaere deal had already gone into escrow. Further, King never disclosed his agreement with Simon to Devogelaere. King deceived his own supervisor, as well, telling him that Simon had failed to produce financial records, without disclosing that he had refused to accept them.

San Paolo seeks to draw an analogy with the facts of *FDIC v. Hamilton* (10th Cir.1997) 122 F.3d 854, where a mitigating factor considered by the federal court was the fact that the fraud was a "single contractual event," even though the scheme took some time. (122 F.3d at p. 862.)[10] While we do not disagree with San Paolo's assertion that such facts are relevant to determining the degree of reprehensibility, we must consider all the relevant facts. (*Adams v. Murakami, supra,* 54. Cal.3d at p. 110.)

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[10]San Paolo also relies upon an unpublished California case, without compliance with California Rules of Court, rule 977. (See e.g., *Cates Construction, Inc. v. Talbot Partners* (1997) previously published at 53 Cal.App.4th 1420, superseded by *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28.) We will disregard the reference.

King's deceit is not so easily dismissed as an isolated incident. It was continuous and intricate. After this action was filed, King filed two false declarations claiming to have had no communication with Devogelaere concerning the property until the evening of June 13. At trial, faced with his own telephone records, King claimed the declarations were true, although he should not have used the word," communicate," because what he really meant was that he did not *negotiate* with Devogelaere.

King then came up with a palpably unbelievable story to support his claim that he did not negotiate with Devogelaere prior to the evening of June 13. King testified that Devogelaere dropped his offer off at his home that evening, and he signed it the morning of June 14 at 8:00 a.m.[11] However, the offer, made on a pre-printed deposit-receipt form, was filled out in purple ink, dated June 12, 1996, in purple ink, and signed by both King and Devogelaere in purple ink, although King's signature was written in both blue ink and purple ink, one signature directly over the other. King initialed each page in blue ink. The date was changed from June 12, 1996 to June 14, 1996, by writing "14" over the "12." King claimed that the original date had been recorded wrong, and had to be changed; and that because the document had multiple copies, it was necessary to write over his signature to make it show on all of them. He also claimed that Devogelaere had left his purple pen with the document.

King testified that after he signed the document at 8:00 a.m., he drove four miles to Devogelaere's home in Pacific Palisades, dropped it in the mailbox, then drove to his office

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[11] King testified in deposition that he did not see the offer until June 14, but he changed that testimony by writing on the transcript that Devogelaere dropped it off at his home the evening of June 13, and that he did not look at it until the next day. In deposition, he testified he signed it at home on his dining-room table, but at trial, it was in his car.

in downtown Los Angeles, arriving by 8:34 a.m.,[12] when he had a telephone conversation in his office, before preparing a memorandum regarding the sale to his supervisor, Who then prepared another memorandum, dated June 13, 1996, which was faxed to New York at 9:15 a.m. that morning, June 14, 1996.

We reject San Paolo's suggestion that the jury was not permitted to consider King's apparently false testimony, because it would amount to a sanction for litigation misconduct, instead of punishment for the conduct which precipitated the lawsuit. We agree that the defendant's behavior at trial may not be the basis of the jury's award. (Cf., *Zhadan v. Downtown L.A. Motors* (1976) 66 Cal.App.3d 481, 500-501.) However, King's false testimony was more than litigation misconduct. It showed how he manipulated the parties and documents at the time of the events in mid-June 1996 in order to support his false claim that he complied with the terms of the letter of intent, and its claim that it was Simon who failed to perform. King's deception at trial showed how false he was prior to trial, and thus, how reprehensible his conduct was.

Substantial evidence also contradicts San Paolo's assertion that it is unlikely to engage in similar wrongdoing in the future, because King is no longer employed by San Paolo. San Paolo did not terminate Kings employment, or distance itself in any way from King's conduct. King was never reprimanded, warned, or counseled; he suffered no job or salary action whatsoever, and even got a bonus that year. The jury could reasonably have concluded that it is unlikely that San Paolo will change its policies to discourage similar conduct in the future.

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[12]Simon had King's telephone records, showing that he made a call from his office at 8:34 a.m. Devogelaere testified that it takes at least 35 minutes to reach downtown Los Angeles from his home, when there is no traffic, and up to 1½ hours with traffic. June 14, 1996, was a Friday.

"Trickery and deceit" are reprehensible wrongs, especially when done intentionally through affirmative acts of misconduct. (*TXO Production Corp. v. Alliance Resources Corp., supra,* 509 U.S. at p. 462.) Our review of the entire record does not compel a conclusion that the award was so grossly disproportionate to the degree of reprehensibility or to the harm done, as to raise the presumption that it was the result of passion and prejudice. Having so concluded, we turn to San Paolo's contentions regarding wealth.

" 'Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence . . . , will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. . . . By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter.' [Citation.]" (*Adams v. Murakami, supra,* 54 Cal.3d at p. 110, citing *Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d at p. 928.)

San Paolo contends that Simon's counsel "invited error" in his closing argument by ignoring the first two "prongs of the test" and arguing "almost exclusively on the wealth of San Paolo."[13] Its reasoning is somewhat difficult to follow, but appears to be a contention that Simon was required to include a discussion of all three *Neal* factors in his closing argument, without emphasizing one over the other, and that he was prohibited from suggesting a particular amount that the jury should award.

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[13]The doctrine of invited error estops an appellant who has induced the commission of error, from asserting it as a ground for reversal. (See 9 Witkin, Cal. Proc. (4th ed. 1997) Appeal, § 383, p. 434) It is not a ground for reversal. (See 2 Cal. Evidence (3d ed. 1986) § 1371, p. 1335.)

San Paolo has cited no authority for its assertions, not even general authority concerning the limitations placed on argument. Even if we assume that it was misconduct for counsel to suggest an amount or to fail to emphasize all three *Neal* factors equally, San Paolo does not claim to have objected to the argument or to have requested an admonishment. We therefore pass on these contentions without consideration. (See *Horn v. Atchison, T. & S.F. Ry. Co., supra,* 61 Cal.2d at p. 610.)

Substantial evidence supports a finding that San Paolo's net worth was between $40,000,000 and $50,000,000. Bob Wurster, an officer of both San Paolo and its parent and sole shareholder, San Paolo Bank, testified that at the end of 1996, the net assets of San Paolo were approximately $46,000,000; and that at the end of the first trial the net assets of San Paolo were approximately $55,000,000. At less than five percent of San Paolo's net worth, the punitive damage award was not excessive on its face, without evidence that such a sum would cause such undue hardship as to render the punishment unreasonably disproportionate to San Paolo's ability to pay. (See *Adams v. Murakami, supra,* 54 Cal.3d at pp. 111-112.) It was San Paolo's burden to make such a showing. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1167.)

San Paolo did not make such a showing, and does not contend here that the amount is unreasonably disproportionate to its ability to pay. It contends in its reply brief, for the first time, that the trial court should have excluded evidence that after the first trial, San Paolo transferred $40,000,000 to the bank.[14] Without such evidence, it reasons, its net worth was shown at the time of

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[14] Wurster admitted that the transfer had been made after the first jury awarded punitive damages. He also admitted that he had attended the first trial, and knew that punitive damages would be the issue in the second trial.

the second trial to be only $4,875,000, which would not justify an award of $1,700,000, since punitive damages awards are generally limited to 10 percent or less of the defendant's net worth. (See *Weeks v. Baker & McKenzie, supra,* 63 Cal.App.4th at p. 1166.)

Ordinarily, a contention made for the first time in an appellant's reply brief may be disregarded, unless some meritorious reason is shown why it was not made in the opening brief. (*Monk v. Ehret* (1923) 192 Cal. 186, 190.) That rule is inapplicable if the new point is raised in order to address a contention in respondent's brief. (See *Fratessa v. Roffy* (1919) 40 Cal.App. 179, 188) In his respondent's brief, Simon discussed the guidelines set forth in *BMW of North America v. Gore, supra,* 517 U.S. at page 574, including the issue of the wealth of the defendant. The Burn of Simon's statement on the subject was as follows: "The wealth of a defendant must also be considered. [Citation.] San Paolo's wealth was appropriately considered to be $40,000,000 to $50,000,000. The jury could rightfully reject San Paolo's poverty plea based on its substantial liquid net worth and the questionable riming of the transfer of that net worth to the parent company."

We need not consider whether Simon's statement opens the door to a contention that the trial court should have excluded evidence of the transfer of assets, because once again, San Paolo fails to refer to its objection to the evidence, fails to refer to the trial court's ruling on its objections, and fails to refer to or discuss any testimony or other evidence to show how it was prejudiced by the evidence; and it fails to support its contention with applicable authority. We therefore deem the point abandoned. (See *Troensegaard v. Silvercrest Industries, Inc, supra,* 175 Cal.App.3d at p. 228.)

4. San Paolo waived any error with respect to BAJI No. 14.72.2

San Paolo contends that the jury instruction in BAJI No. 14.72.2 is so vague that its right to due process was infringed by the use of it. San Paolo does not refer to its objection to the instruction, if any, in the trial-court record, or to any clarifying instruction it may have proposed. Our review of the record reveals that the parties jointly requested BAJI No. 14.72.2.

It is a long-established rule that one may not complain of instructions given to a jury at his own request. (*Emerson v. County of Santa Clara* (1871) 40 Cal. 543.) Further, a party may not complain on appeal about an instruction which was correct, but incomplete or vague, unless he requested an additional or clarifying instruction in the trial court. (*Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 9.) Since San Paolo does not contend that it requested an additional or clarifying instruction in the trial court, and we have found none in the record, San Paolo has not preserved this points for appeal, and we pass it without further consideration.

5. San Paolo's contentions regarding California law and criminal standards are too vague to address

San Paolo's final contention appears to be that all California law relating to punitive damages is "constitutionally vague," and the imposition of punitive damages should be governed by the same standards which apply to criminal penalties.

A challenge to a statute as vague in its entirety usually involves a review of the words of the enactment, its application in the particular case of the party challenging it, and finally, hypothetical applications of the law. (See *Village of Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 494-495, fn. 5.) San Paolo has made

no effort to make such an analysis, and has not even identified the specific "California law" to which it objects, or which criminal standards should apply.

Simon has understandably made no attempt to address this contention in his respondent's brief, and we decline San Paolo's apparent invitation to address the subject of vagueness and constitutionality in the abstract, except to point out that in general, California's procedures for the imposition of punitive damages have been held to comply with constitutional requirements of due process.[15] (See *Sierra Club Foundation v. Graham, supra,* 72 Cal.App.4th at pp. 1160-1163; *Las Palmas Associates v. Las Palmas Center Associates, supra,* 235 Cal.App.3d at p. 1258, fn. 8.)

II. Simon's Cross-Appeal

A. Simon's proposed special verdict form was properly refused

The letter of intent signed by both parties provides, in part: "Seller and Buyer agree to exclusively negotiate upon execution of this letter." King admitted that San Paolo was bound by that term of the letter of intent, which prohibited him from negotiating, at least for 24 hours, with any other potential buyers.

Simon proposed a special verdict form which asked, "Did the defendant and plaintiff agree to exclusively negotiate with each other to complete the sale of the real property located at 816 South Figueroa Street, Los Angeles, California?" Simon contends that the trial court erred in refusing this question in favor of the special verdict as given, which asked, "Was there a binding and enforceable agreement between [San Paolo] and [Simon]?"

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[15] See footnote 6, above.

As we have discussed in relation to San Paolo's appeal, the special verdict form used was ambiguous, and called for a legal conclusion. Simon did not object to it on either of those grounds, and does not object to it here on those grounds, and we consider them waived. (See *Brokaw v. Black-Foxe Military Institute, supra,* 37 Cal.2d at p. 280.)

Whether to allow a more or less detailed special verdict form was within the trial court's discretion. (See *Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1487.) A trial court abuses its discretion if the special verdict form fails to dispose of all elements of the cause of action. (*Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 854-855.) As ambiguous as it was, the form which was used did not fail to dispose of the contract cause of action, and the proposed question regarding negotiation was subsumed in it. Had the jury found an enforceable agreement to negotiate exclusively with Simon, it would have properly answered that there was, in fact, an enforceable agreement.

The burden is on a party complaining of the trial court's exercise of discretion to show a clear case of abuse. (*Denham v. Superior Court, supra,* 2 Cal.3d at p. 566.) Further, Simon was required to show that any abuse was "'"sufficiently grave to amount to a manifest miscarriage of justice. . . ."' [Citation.]" (*Mission Imports, Inc. v. Superior Court, supra,* 31 Cal.3d at p. 932.) The jury found there was no enforceable contract. Simon has not suggested how the result would have been different if the jury had been asked more specifically whether there was a contract to negotiate exclusively. Nor has Simon provided any authority for his contentions. We therefore deem the point waived. (See *Troensegaard v. Silvercrest Industries, Inc., supra,* 175 Cal.App.3d at p. 228.)

B. Jury Instructions

Simon contends that if several jury instructions had not been refused by the trial court, the jury might have found the letter of intent, or at least part of it, to be an enforceable contract. A letter of intent which contains all essential terms may constitute an enforceable contract, depending on the parties' intent and their expectations. (See *California Food Service Corp. v. Great American Ins. Co.* (1982) 130 Cal.App.3d 892, 897.) Also depending upon the intent of the parties, a detailed letter of intent may be an agreement to negotiate in good faith. (See *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1033.)

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case. [Citations.]" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.)

To determine whether a theory is supported by substantial evidence we reverse the usual rule of appellate review, and review the evidence in the light most favorable to the appellant, in this case, the cross-appellant, Simon. (See *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674.) Applying that standard, we agree that substantial evidence supports the formation of a contract.[16]

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[16]San Paolo devotes substantial energy to arguing that there was substantial evidence showing that the letter of intent was merely an agreement to agree (see *Autry v. Republic Productions, Inc.* (1947) 30 Cal.2d 144, 151), and that the parties did not intend to be bound until they signed a deposit receipt. (See *Gavina v. Smith* (1944) 25 Cal.2d 501, 504.) Whether substantial evidence supports the judgment is not, however, our inquiry; rather, it is whether substantial

After several months of on-again, off-again negotiation, San Paolo agreed to sell Simon the property located at 816 South Figueroa, for $1.1 million. Atha drafted a two-page letter of intent, which set forth all the terms which the parties had negotiated regarding the sale of the building. The first sentence of the draft letter of intent stated, "Due to the motivation of both parties and the anticipated short escrow, the following shall serve as a binding Letter of Intent for purpose of entering escrow. . . ."

On June 12, 1996, after the parties agreed to a few changes, Atha faxed to Simon a final version of the letter of intent, containing more than sixteen terms, with King's signature already affixed. One of the changes was made without Simon's knowledge: King had instructed Atha to remove the word, "binding," from the first sentence. However, it was still Simon's understanding that the letter of intent would be a binding contract, and that it contained all the essential terms of their contract. He was told that the only terms left to negotiate were "housekeeping" terms, which would be addressed in the escrow.[17]

Atha testified that he also thought the letter of intent was to be a binding contract, once it was approved by New York and escrow was opened, and he thought that it reflected all the essential terms of the parties' agreement.[18] Even though he took the word, "binding," out of the final draft at King's request, and described it on the cover sheet as "nonbinding" when he faxed Simon a copy of the fully executed letter of intent, he interpreted "nonbinding" as meaning only that the agreement was subject to approval by San Paolo's New

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evidence supports the requested instruction. (*O'Meara v. Swortfiguer* (1923) 191 Cal. 12, 15.)

[17]He did not say who told him.

[18]Atha changed this testimony in the second trial, claiming to have discussed the change to a non-binding letter of intent with Simon.

York office, and the opening of escrow.[19] The letter of intent stipulated that escrow was to open upon approval of the terms and conditions of the letter of intent by San Paolo's Los Angeles and New York offices, which would be given no later than 3:00 p.m. the next day. The evening of the day that the letter of intent was signed by both Simon and King, Atha told Simon, "We have a deal. Go home, sleep like a baby." King testified that although he did not intend the letter of intent to be binding, he considered himself bound by the promise not to negotiate with others.

We turn first to Simon's contention that since all parties intended to be bound by the letter of intent's exclusive-negotiation term, substantial evidence supports the existence of an agreement to negotiate in good faith, and the court should have given his proposed instruction on that issue.

That proposed instruction reads as follows: "A duty of good faith and fair dealing may exist even in an agreement that is not binding. Even if you determine that the letter of intent was not binding on the defendant to sell the subject property, you are not precluded from finding that the letter of intent was an agreement to use best efforts or to negotiate in good faith. If you determine that the letter of intent was an agreement to use best efforts or to negotiate in good faith to complete a sale of the property, and you further determine defendant failed to negotiate in good faith or to use best efforts to complete the sale or that the defendant breached the term of the agreement to exclusively negotiate with plaintiff, you may determine that here was breach of the implied covenant of good faith and fair dealing resulting in a breach of contract."

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[19] Simon received that fax after the letter of intent was fully executed, and did not read the cover sheet or notice that it contained the word, "nonbinding."

The determination of whether there existed an agreement to negotiate in good faith is made according to the ordinary rules of contract. (See *Racine & Laramie, Ltd. v. Department of Parks & Recreation, supra,* 11 Cal.App.4th at pp. 1033-1035.) The jury in this case was properly instructed on the rules of contract formation. Instructions which are cumulative or merely amplifications of other instructions should not be given. (*Hicks v. Ocean Shore Railroad, Inc.* (1941) 18 Cal.2d 773, 783.)

"Formula instructions," such as that proposed by Simon, are properly refused, unless they are reasonably brief and concise, and are accurate statements of the law, understandable to the average juror. (See *Dodge v. San Diego Electric Ry. Co.* (1949) 92 Cal.App.2d 759, 763-764.) The proposed instruction is neither brief nor concise, and contains the misleading statement that "[a] duty of good faith and fair dealing may exist even in an agreement that is not binding," implying that a duty to negotiate in good faith may exist in the absence of one or more elements of contract. In fact, an agreement to negotiate in good faith must meet the requisites of an enforceable contract. (*Racine & Laramie, Ltd. v. Department of Parks & Recreation, supra,* 11 Cal.App.4th at p. 1033.) The trial court properly refused the instruction, and was not obligated to modify it or propose another in its place. (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 717.)

Relying on *Jacobs v. Tenneco West, Inc.* (1986) 186 Cal.App.3d 1413, and *Jacobs v. Freeman* (1980) 104 Cal.App.3d 177, Simon also contends that since substantial evidence supported the formation of a contract, subject to the approval of San Paolo's senior management in Los Angeles and New York, the jury should have been instructed as to San Paolo's obligation to seek such approval in good faith. Simon contends that if the jury had been

instructed as to San Paolo's obligation to exercise good faith in seeking approval, it might have found the letter of intent to be an enforceable contract.

In *Jacobs v. Freeman,* the parties' contract contained an express provision similar to one in the letter of intent, conditioning the opening of escrow upon approval by the seller's board of directors. The court of appeal reversed a nonsuit, holding that the provision was intended to be a condition precedent to the seller's duty to convey title to the land rather than a condition precedent to the formation of a contract. (104 Cal.App.3d at p. 189) The implied covenant of good faith and fair dealing required the seller's officers to submit the contract to the board of directors, and their failure to do so was a breach of contract. (*Id.* at pp. 189-190.)

Jacobs v. Tenneco West involved the same parties as in *Jacobs v. Freeman.* The seller appealed an adverse judgment upon retrial, contending that the buyer had failed to prove that it had acted in bad faith in failing to submit the contract to the board. (*Jacobs v. Tenneco West, Inc., supra,* 186 Cal.App.3d at p. 1415, 1418.) The court held that since the buyers did not assume the risk of lack of cooperation, and the lack of cooperation was not shown to be justifiable, the seller bore the burden to establish that its failure did not contribute materially to the nonoccurrence of the condition. (*Id.* at p. 1418) When seller then responded that the board would not have approved the contract in any case, the court held that such an excuse for nonperformance is an affirmative defense, upon which the seller had the burden of proof. (*Id.* at p. 1419.)

Here, San Paolo interposed no such affirmative defense. However, in his closing statement, its counsel argued that even if the parties intended the letter of intent to be a binding 'contract, it was unenforceable because conditions were not met, including the requirement of approval from

New York, and the opening of escrow, which was, in turn, conditioned upon approval from New York. Nevertheless, King admitted that he never submitted the letter of intent or Simon's offer for approval. Further, although San Paolo's approval procedure required the recommendation of King's supervisor, William Schack, then the submission of a written memorandum to one of two officers in New York, King never submitted anything to them, and never asked for Schack's recommendation.

Simon contends that under the rationale of the two *Jacobs* holdings, San Paolo was estopped to argue that the sale was not or would not have been approved by New York. However, Simon did not object to counsel's argument; nor did he seek a ruling from the trial court on his estoppel theory. Instead, he proposed four lengthy, rambling, argumentative, and confusing instructions, and an instruction on the implied covenant of good faith and fair dealing.[20] The form of the proposed instructions alone

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[20] Proposed instruction number 4 reads in part: "In this case, the agreement between plaintiff and defendant gave defendant the right to seek written approval of the . . . New York offices. . . . If you determine that (1) the defendant sought written approval . . . and (2) that the senior officers rejected the terms and conditions of the contract reasonably and in good faith, you may determine that the contract is not enforceable. However, if you determine that the defendant failed to seek written approval . . . , the condition is excused . . . and may be determined by you not to prevent the formation of a binding contract. . . . " Number 5 states: "If you determine that the individuals negotiating with the plaintiff . . . had an obligation to seek approval from . . . New York . . . , you must determine that such individuals had a duty to submit the contract with a recommendation of approval. If you find that they did not recommend approval of the terms of the contract . . . , you may determine that their failure was an unreasonable prevention of the performance of the condition which excused the condition if you also determine that the failure to recommend the terms and conditions of the Letter of Intent contributed materially to the failure to obtain such approvals, you may conclude that there was a

justified their refusal. (See *Dodge v. San Diego Electric Ry. Co., supra,* 92 Cal.App.2d at pp. 763-764.)

The proposed instructions are also ambiguous. On the one hand, they appear to assume that New York's approval was a condition precedent to the formation of a contract. At the same time, the proposed instructions appear to instruct the jury to assume that a contract had been formed, and San Paolo's performance was conditioned upon New York approval.

A covenant of good faith and fair dealing is implied in all contracts. (See *Universal Sales Corp. v. California etc. Mfg. Co.* (1942) 20 Cal.2d 751, 771.) However, it is not implied if no contract has been Armed, and does not require a party to enter into a contract. (*Racine & Laramie, Ltd. v. Department of Parks & Recreation, supra,* 11 Cal.App.4th at p. 1032.) Neither *Jacobs v. Freeman,* nor *Jacobs v. Tenneco*

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breach of the contract." Number 6 reads: "Under the terms of the contract, defendant was obligated to open escrow and attempt to complete the sale of the property only if the terms and conditions of the letter of intent were approved, in writing, by... New York.... However, the implied covenant of good faith and fair dealing also required defendant to make reasonable efforts to obtain the approval..., and if it failed to do so, the law does not permit it to take advantage of that failure to avoid an obligation to sell the property. Consequently, if the failure to obtain written approval... was caused by defendant's failure to make reasonable efforts to obtain such approval, then the defendant is obligated to plaintiff in the same manner as if the senior officers had approved... the letter of intent." Number 7 states: "If you find that the defendant made reasonable efforts to obtain such approval, you may find that[it]had no obligation under the contract to sell the property. On the other hand, if you find that the defendant failed to make reasonable efforts to obtain the approval..., you must find that [it] is obligated to plaintiff in the same manner as if they obtained such approval. Unless defendant proves, by a preponderance of the evidence, that the senior officers would not have given its approval, even if they had made reasonable efforts to obtain such approval, you may determine that defendant is deemed to have approved the terms and conditions of the letter of intent."

West held otherwise. In those cases, there was no issue concerning the formation of a contract. There, an executory bilateral contract to sell the land had been created, obligating the seller to convey land upon board approval. (*Jacobs v. Freeman, supra,* 104 Cal.App.3d at p. 187.) Board approval was not a condition precedent to the formation of the contract. (*Jacobs v. Tenneco West, Inc., supra,* 186 Cal.App.3d at p. 1415) Thus, to the extent the instructions suggest that San Paolo was required by the covenant of good faith and fair dealing to bring about a condition precedent to the formation of the contract, they are not supported by those authorities, and they were incorrect.

Further, since San Paolo did not interpose the affirmative defense of excuse of a condition precedent to its performance, the court was not required to instruct as to the burden of proof discussed in *Jacobs v. Tenneco West, Inc., supra,* 186 Cal.App.3d at pages 1418-1419. Thus, the trial court properly refused the entirety of the instructions, and had no duty to cull out what was proper, modify them, or give others in lieu of them. (See *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, supra,* 227 Cal.App.2d at p. 717.)

DISPOSITION

The judgment is affirmed. Each party shall bear its own costs on appeal.

Not to be Published

HASTINGS, J.

We concur:

EPSTEIN, Acting P.J.

CURRY, J.

APPENDIX C

Court of Appeal, Second Appellate District,
Division Four - No. B121917
S102972

SUPREME COURT
FILED
FEB 20 2002
Frederick K. Ohlrich Clerk

DEPUTY

IN THE SUPREME COURT OF CALIFORNIA

En Banc

LIONEL SIMON, Plaintiff and Respondent,

v.

SAN PAOLO U.S. HOLDING COMPANY, INC.,
Defendant and Appellant

Petition for review DENIED.

GEORGE,
Chief Justice

C-2

Court of Appeal, Second Appellate District,
Division Four - No. B121917
S102972

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DEPUTY

IN THE SUPREME COURT OF CALIFORNIA

LIONEL SIMON, Plaintiff and Respondent

v.

SAN PAOLO U.S. HOLDING COMPANY, INC.,
Defendant and Appellant

The time for granting or denying review in the above-entitled matter is hereby extended to and including March 15, 2002, or the date upon which review is either granted or denied.

GEORGE,
Chief Justice

APPENDIX D

D-1

Supreme Court of the United States

No. 00-1457

SAN PAOLO U.S. HOLDING COMPANY, INC.,

Petitioner

v.

LIONEL SIMON, dba LIBERTY PAPER COMPANY

ORDER ALLOWING CERTIORARI. Filed May 29, 2001

The petition for writ of certiorari to the Court of Appeal of California, Second Appellate District, is granted.

Supreme Court of the United States

No. 00-1457

SAN PAOLO U. S. HOLDING COMPANY, INC.,

Petitioner

v.

LIONEL SIMON, dba LIBERTY PAPER COMPANY

ON WRIT OF CERTIORARI to the Court of Appeal of California, Second Appellate District.

THIS CAUSE having been submitted on the petition for a writ of certiorari and the response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is vacated with costs, and the case is remanded to the Court of Appeal of California, Second Appellate District, for consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. ___ (2001).

IT IS FURTHER ORDERED that the petitioner San Paolo U. S. Holding Company, Inc., recover from Lionel Simon, dba Liberty Paper Company Three Hundred Dollars ($300.00) for costs herein expended.

May 29, 2001

Clerk's costs: $300.00

APPENDIX E

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 17
HON. RICHARD P. KALUSTIAN, JUDGE

LIONEL SIMON, ET AL.,
PLAINTIFFS,
VS.
SAN PAOLO BANK, ET AL.,
DEFENDANTS.

NO. BC 152431

REPORTERS' TRANSCRIPT OF PROCEEDINGS
AUGUST 1, 4, 5, 6, 7, 8, 11, 12, 1997
OCTOBER 3, 8, 1997; DECEMBER 9, 1997
FEBRUARY 20, 1998; MARCH 6, 9, 10, 1998
MARCH 11, 12, 13, 1998; APRIL 8, 1998

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VOLUME 10 OF 10 VOLUMES.
PAGES 1828 THROUGH 2003, INCL.
ELIZABETH GARCIA, ERM.
GLORIA J. HALL, CSR #4165
OFFICIAL REPORTER

LOS ANGELES, CALIFORNIA;
WEDNESDAY, APRIL 8, 1998

8:45 A.M.

DEPARTMENT NO. 17

HON. RICHARD P. KALUSTIAN, JUDGE

THE COURT: SIMON VERSUS SAN PAOLO BANK.

MR. JARDINI: GOOD MORNING, YOUR HONOR. ANDY JARDINI FOR LIONEL SIMON.

MR. LUDWIG: GOOD MORNING, YOUR HONOR. MITCHELL LUDWIG ALSO FOR PLAINTIFF LIONEL SIMON.

MR. RICHMAN: GOOD MORNING, YOUR HONOR. STEVEN RICHMAN FOR THE DEFENDANT.

I HAVE READ THE TENTATIVE RULING. I WILL RESTRICT MY RESPONSE TO THE OPPOSITION FILED BY MR. SIMON TO OUR MOTIONS. BEFORE DOING THAT, HOWEVER, I WOULD LIKE TO INQUIRE OF THE COURT. WE DID FILE

OBJECTIONS AND REQUESTS TO STRIKE PORTIONS OF MR. LUDWIG'S —

THE COURT: I DIDN'T READ THE DECLARATION AT ALL.

MR. RICHMAN: SO I ASSUME IT'S BEEN REJECTED?

THE COURT: I DIDN'T READ IT, SO YOUR OBJECTION IS SUSTAINED. WHEN I SAW THAT IT WAS GOING TO BE A RECAP OF THE TRIAL, I JUST DIDN'T READ IT.

MR. RICHMAN: THERE ARE JUST A FEW COMMENTS I'D LIKE TO MAKE WITH REGARD TO THE OPPOSITION FILED BY MR. SIMON'S COUNSEL.

FIRST IS THAT COUNSEL DOES ACKNOWLEDGE THE STATEMENTS MADE DURING CLOSING WHICH WE BELIEVE TO BE INFLAMMATORY. THEY OBVIOUSLY DENY THAT THEY ARE INFLAMMATORY, BUT THE WORDS SPEAK FOR THEMSELVES.

TO ACCUSE SAN PAOLO OF COMMITTING A CRIME THREE TIMES, TO USE AN ANALOGY OF ATTEMPTED MURDER OF SOMEONE SHOOTING A GUN INTO A CROWD, AND NOT JUST ANYONE, BUT THE PRESIDENT OF SAN PAOLO BANK, IS CLEARLY INAPPROPRIATE.

AND TO ACCUSE SAN PAOLO OF CRIMES AND BRIBES WHERE THERE IS NO EVIDENCE OF IT, AND TO USE STATEMENTS SUCH AS LUNCH MONEY AND PARKING TICKETS WITH REGARD TO COMPARISON TO PUNITIVE DAMAGES IS CLEARLY INFLAMMATORY AND HAS NO PLACE IN FRONT OF A JURY.

AND THOSE TYPES OF COMMENTS ARE MADE FOR ONE PURPOSE ONLY, AND THAT'S TO INFLAME THE JURY. AND THOSE COMMENTS SHOULD NEVER BE MADE. COUNSEL SAYS THEY ARE NOT INFLAMMATORY, BUT THEY HAVE NO BUSINESS BEING MADE, ESPECIALLY THE SECOND TIME AROUND.

THE COURT: I DON'T RECALL THERE BEING AN OBJECTION.

MR. RICHMAN: THE COURT INSTRUCTED US NOT TO MAKE ANY OBJECTIONS DURING CLOSING. AND IT IS IN THE TRANSCRIPT AND I CAN QUOTE IT. I HAVE —

THE COURT: I THINK WHAT I SAID WAS DON'T MAKE OBJECTIONS BASED UPON THE OBJECTION "MISSTATES THE EVIDENCE" BECAUSE EACH SIDE — UNLESS IT'S A GROSS MISSTATEMENT, SO GROSS THAT I HAVE TO CORRECT IT. BUT EACH SIDE HAS A DIFFERENT VIEW OF THE EVIDENCE. THAT'S WHY WE HAVE TRIALS.

AND IF LAWYERS ARE CONTINUALLY MAKING THE OBJECTION "MISSTATES THE EVIDENCE," ALL WE END UP WITH IS A TOTALLY DISJOINTED ARGUMENT. AND THAT'S WHY I SAID THAT. I THINK I ADMONISHED THE JURY IN THE BEGINNING THAT THIS WAS THE CASE, AND THEIR VIEW OF THE EVIDENCE SHOULD PREVAIL. BUT THAT DOES NOT HAVE ANYTHING TO DO WITH STATEMENTS YOU CONSIDER INFLAMMATORY AND NOT PART OF THE EVIDENCE. SO YOU SHOULD HAVE OBJECTED.

MR. RICHMAN, I READ THE STATEMENTS. I DON'T FIND THEM SO INFLAMMATORY THAT IT'S GOING TO CHANGE THE JURORS' MINDS. LAWYERS ARE GIVEN WIDE LATITUDE IN ARGUMENT TO MAKE THE ARGUMENTS THAT THEY WANT TO UNLESS THEY JUST GET WAY OUT OF HAND. AND I DON'T SECOND GUESS THE WAY ARGUMENTS ARE CONDUCTED. IT DOESN'T MAKE ANY SENSE TO DO THAT.

MR. RICHMAN: I JUST DON'T SEE HOW ONE CAN RECONCILE THE ACCUSATIONS OF CRIMINAL CONDUCT AND ATTEMPTED MURDER, A GUN SHOOTING INTO THE CROWD. THAT HAS NO BASIS IN THE CASE AT ALL.

THE COURT: BUT MR. RICHMAN, I THINK THE JURORS COMPLETELY UNDERSTOOD WHAT MR. JARDINI WAS SAYING. I DID. I DIDN'T ASSUME THIS WAS CRIMINAL CONDUCT. JUST BECAUSE SOMEBODY SAYS SOMETHING DOESN'T MEAN THAT THE PERSON RECEIVING THE INFORMATION IS GOING TO ASSUME IT THAT WAY. FRANKLY, I DIDN'T TAKE IT THAT WAY AND I DON'T THINK —

MR. RICHMAN: IT HAS NO BASIS FOR EVEN BEING SAID. IT SHOULD NOT BE SAID IN FRONT OF A JURY. THIS IS A CIVIL CASE. TO ACCUSE SOMEONE OF A CRIME, ESPECIALLY ATTEMPTED MURDER OR BRIBERY WHERE THERE IS NO EVIDENCE IS TOTALLY INAPPROPRIATE. AND WE SHOULDN'T HAVE BEEN PUT IN A POSITION TODAY OF SPECULATING WHETHER OR NOT THE JURY TOOK THAT INTO CONSIDERATION. I WOULD THINK THEY DID.

BUT THE POINT IS COUNSEL PUT IT INTO PLAY AND SHOULDN'T HAVE. AND I THINK IT'S UNDISPUTED THAT THOSE TYPE OF ALLEGATIONS HAVE NO BASIS IN THIS TYPE OF COURT, ESPECIALLY IN A CIVIL CASE.

THE COURT: I DISAGREE.

MR. RICHMAN: THE SECOND POINT I'D LIKE TO MAKE IS THE OPPOSITION IGNORES THE BMW AND HASLIT CASES. IT IGNORES THE FACT THAT THOSE CASES SEEM TO INDICATE THAT ANY RATIO GREATER THAN 4 TO 1 RAISES EYEBROWS OF SUSPICION. AND ONE HAS TO QUESTION WHETHER OR NOT IT'S AN APPROPRIATE ORDER.

THIS IS FAR IN EXCESS OF THE CLEAR MAJORITY OF THE CASES. THERE ARE ALWAYS EXCEPTIONS CITED BY THE PLAINTIFF. BUT IN THIS CASE, THE CONDUCT DOESN'T JUSTIFY AN AWARD OF $1.7 MILLION DOLLARS FOR A $5,000 COMPENSATORY AWARD.

AND THOSE CASES, ESPECIALLY THE HASLIT AND BMW CASES WHICH ARE 1990 SUPREME COURT CASES DECIDED WITHIN THE LAST TWO TO FOUR YEARS, HAS TO BE TAKEN IN CONSIDERATION BY THIS COURT. AND THEY DON'T JUSTIFY THE TYPE OF AWARD IN THIS CASE.

I WOULD AGAIN ASK THE COURT TO INDEPENDENTLY WEIGH THE EVIDENCE. THE COURT HAS AN OBLIGATION TO REWEIGH THE EVIDENCE. THAT IS THE DOMAIN OF THE JUDGE. BUT THE FACT THAT WE HAVE HAD A SECOND TRIAL OF THIS DOESN'T MEAN THAT TWO WRONGS MAKE A RIGHT.

THE COURT PREVIOUSLY REDUCED THE AWARD. I WOULD SUBMIT IT SHOULD DO SO AGAIN. AT SOME POINT IT WILL BE CITED ON APPEAL AS TO WHAT THE REASONABLENESS IS. BUT THE POINT IS THE COURT HAS AN INDEPENDENT DUTY TO WEIGH THE EVIDENCE AND NOT TO ACCEPT THE JURY AT FACE VALUE, ESPECIALLY IN LIGHT OF CONDUCT OF COUNSEL IN CLOSING AND IN LIGHT OF THE EVIDENCE.

COUNSEL ALSO MISSTATED THE EVIDENCE AND THE LAW WITH REGARD TO THE ISSUE OF HARM. WE BROUGHT A MOTION IN LIMINE TO PREVENT ANY APPRAISALS COMING IN THE SECOND TIME SINCE THE FIRST JURY AWARDED $5,000. BUT YET, PLAINTIFF WAS ALLOWED TO INTRODUCE NEW TESTIMONY FROM A NEW EXPERT IN WHICH HE TESTIFIED THAT IT WAS $400,000 IN HARM.

BUT THE LAW IS CLEAR THE HARM WAS CALCULATED AT THE FIRST TRIAL AND THAT WAS $5,000. AND IT WAS WRONG TO ALLOW NEW EVIDENCE TO COME IN ON HARM FOR HARM TO EVEN BE DISCUSSED BECAUSE THE JURY HAD ALREADY ISSUED THAT AWARD.

THE COURT: WELL, THAT'S A KNOTTY LITTLE AREA, MR. RICHMAN. I HAVE READ THE CASES AND THAT'S A KNOTTY LITTLE AREA. AND IF THERE IS A DAMAGE AWARD, CAN YOU STILL CONSIDER IT THE SAME WAY YOU'D CONSIDER IF THERE WERE NO DAMAGE AWARD, BUT THE AWARD FOR THE PLAINTIFF WERE FOR AN INJUNCTION OR SOME OTHER EQUITABLE RELIEF? I AM JUST NOT SURE.

I THINK I UNDERSTAND YOUR ARGUMENT. AND I GUESS AT THIS POINT, LET ME MAKE THESE COMMENTS SO YOU UNDERSTAND WHY I AM DOING WHAT I AM DOING AND THE COURT OF APPEAL WILL UNDERSTAND BECAUSE I AM SURE IT WILL LAND THERE. PROBABLY IT OUGHT TO LAND THERE, I GUESS.

LET ME TELL YOU WHAT I THINK HAPPENED. I THINK THE JURY CONSIDERED MR. KING'S CONDUCT REPREHENSIBLE. I KNOW YOU HAVE A DIFFERENT VIEW OF WHAT HE DID. BUT I JUST THINK THAT THE JURY CONSIDERED, THEY LOOKED AT MR. KING, THEY LISTENED TO MR. KING, THEY EVALUATED MR. KING. IN FACT, BOTH JURIES DID. AND I HAVE COME TO THE CONCLUSION AFTER TWO JURY TRIALS THAT THEY THOUGHT KING WAS LYING. I KNOW YOU DON'T THINK SO, AND IT MAY NOT BE TRUE. I SIMPLY DON'T KNOW AS A MATTER OF FACT. BUT I CAN TELL YOU THAT'S THE WAY I READ IT.

AND THE WITNESSES WHO SUPPORTED KING, I THINK THE JURY BELIEVED THEY LIED, TOO. LYING IS VERY POWERFUL IN COURT IF THE JURY BELIEVES THAT SOMEBODY LIES.

WE CAN DISCUSS WHETHER MR. KING LIED FOREVER AND PROBABLY NEVER COME TO A CONCLUSION, MR. RICHMAN. AND I DO NOT PASS JUDGMENT ON WHETHER HE LIED OR DIDN'T LIE. BUT I THINK THAT'S WHERE THE JURY DID IT. I THINK THEY THOUGHT HIS CONDUCT WAS TOTALLY UNCALLED FOR AND REPREHENSIBLE. AND I THINK THAT'S WHY THEY LEVELED THE PUNITIVE DAMAGES. A

DIFFERENT JURY HEARING ABOUT THE SAME EVIDENCE DID IT AGAIN.

I WOULD CONSIDER $1.75 MILLION DOLLARS VERY CLOSE TO $2.5 MILLION DOLLARS WHEN YOU CONSIDER IT IN RELATIONSHIP TO THE $5,000 IN COMPENSATORY DAMAGES.

MR. RICHMAN: I AM NOT HERE TO ARGUE ABOUT MR. KING. MY POINT IS THAT THE AWARD OF PUNITIVE DAMAGES, NO MATTER WHAT THE JURY FELT ABOUT MR. KING IS DISPROPORTIONATE TO THE AWARD OF COMPENSATORY DAMAGES.

IT'S UNDISPUTED THE FIRST JURY AWARDED $5,000 IN COMPENSATORY DAMAGES DESPITE A REQUEST FOR OVER A MILLION DOLLARS IN DAMAGES. I THINK THAT IS THE POINT THAT HAS TO BE FOCUSED UPON. ONCE THAT AWARD COMES IN AT $5,000, ANY PUNITIVE DAMAGE AWARD HAS TO BE LIMITED TO A RATIO THAT IS IN COMPLIANCE WITH HASLIT AND BMW.

AND REGARDLESS OF MR. KING'S CONDUCT, NO MATTER HOW REPREHENSIBLE OR NOT, IT HAS TO BEAR SOME RELATION TO THAT. IT'S MY FEELING THAT THE JURY, WHEN SEEING THE FINANCIAL STATEMENT WITH $50 MILLION DOLLARS ON IT AND HAVING NO GUIDANCE WITH REGARD TO WHAT IS REASONABLE IS GOING TO LOOK AT THE FINANCIAL STATEMENT OF $50 MILLION DOLLARS AND LISTEN TO THE CLOSING ARGUMENT OF COUNSEL WITH THE ALLEGATIONS OF CRIMINAL CONDUCT AND ATTEMPTED MURDER AND SAYING THAT A $15,000 AWARD IS A PARKING TICKET OR LUNCH

MONEY AND WITHOUT ANY GUIDANCE, THEY ARE GOING TO GO AHEAD AND AWARD A MILLION OR $2 OR $3 MILLION DOLLARS BECAUSE WHEN COMPARED TO A FINANCIAL STATEMENT, IT'S INCONSEQUENTIAL.

BUT IT TOTALLY IGNORES ONE OF THE THREE CRITICAL ELEMENTS OF AN AWARD OF PUNITIVE DAMAGES, AND THAT IS SOME REASONABLE RELATIONSHIP TO THE COMPENSATORY AWARD. AND IT JUST SHOCKS ME. AND I AM SURE ANYONE READING OR REVIEWING THIS CASE WILL BE SHOCKED TO SEE A COMPENSATORY AWARD OF $5,000 FOLLOWED UP BY A PUNITIVE DAMAGE AWARD OF $1.75 MILLION DOLLARS.

THE COURT: IF THAT'S ALL YOU KNEW ABOUT THE CASE, THOSE TWO FACTS, IT PROBABLY WOULD SHOCK MOST PEOPLE, I AGREE. BUT THAT ISN'T WHERE IT BEGINS NOR WHERE IT ENDS. THERE IS A WHOLE CASE IN BETWEEN THOSE TWO BOOKENDS.

MR. RICHMAN, I UNDERSTAND YOUR ARGUMENT. I HAVE FULLY READ YOUR BRIEF. IN FACT, IT'S WELL DONE. YOU MADE YOUR POINT VERY CLEARLY.

MR. RICHMAN: ONE LAST POINT I'D LIKE TO MAKE IS THAT THERE IS ALWAYS ANOTHER STORY TO THE CASE. AND THE SAME IS TRUE WITH THE BMW. BUT THE SUPREME COURT HAS STATED ON MORE THAN ONE OCCASION THAT WHEN THE RATIO EXCEEDS 4 TO 1, IT HAS TO BE LOOKED AT WITH A CRITICAL EYE. AND SOME CASES SAY IT SHOULD BE PRESUMPTIVELY SUBJECT TO OBJECTION AND OVERTURNED IF

IT'S GREATER THAN THOSE RATIOS. AND 4 TO 1 IS FAR IN EXCESS OF THOSE CASES AND DOES NOT BEAR A SUPPORT OR AFFIRMATION BY THIS COURT.

THE COURT: WELL, THERE ARE MANY CASES ON PUNITIVE DAMAGES. AND THERE IS A THREE PART TEST FOR PUNITIVE DAMAGES. BUT AS A PRACTICAL MATTER, IT BOILS DOWN TO ABOUT THE SAME SORT OF ANALYSIS THAT THE JURY GIVES TO EMOTIONAL DISTRESS DAMAGES. IT'S NOT DONE WITH ANY PARTICULAR PRECISION. AND THE CASES HAVE NOT REQUIRED THAT IT BE DONE WITH PARTICULAR PRECISION.

I HAVE ANALYZED IT FROM THE STANDPOINT OF EACH OF THE THREE TESTS, AND I HAVE CONCLUDED THAT IN ALL THE FACTS IN THIS CASE AND THE TWO TRIALS, THE TWO VERDICTS AND EVERYTHING THAT I HEARD IN THE CASE, THE MOTION IS DENIED.

MR. JARDINI: THANK YOU, YOUR HONOR.

THE COURT: I WILL PROBABLY BE SEEING YOUR FIRST PAPERS FAIRLY SOON.

MR. RICHMAN: I WILL REQUEST NOTICE OF THE RULING.

THE COURT: MR. JARDINI, YOU WANT TO GIVE NOTICE?

MR. JARDINI: WELL, YOUR HONOR —

MR. RICHMAN: THERE IS A JUDGMENT. I'D LIKE TO REVIEW IT. AND I WILL CALL COUNSEL TODAY. I DON'T THINK WE HAVE ANY OBJECTIONS TO IT.

MR. JARDINI: I WILL ADVISE THE COURT.

MR. LUDWIG: I SERVED THE JUDGMENT A WHILE AGO ON THEIR OFFICES. IT'S BEEN WITH THE COURT.

THE COURT: HAVE YOU TAKEN A LOOK AT IT?

MR. RICHMAN: I HAVE NOT, BUT I WILL LOOK AT IT EITHER NOW OR WHEN I GET BACK TO THE OFFICE AND CALL COUNSEL UP.

MR. LUDWIG: I FILED IT THE MONDAY AFTER THE TRIAL.

THE COURT: WELL, WHY DON'T YOU GIVE US A CALL IF THERE IS ANYTHING GLARING ABOUT IT. GIVE US A CALL THIS AFTERNOON. IT LOOKS LIKE IT'S IN ORDER TO ME.

ESSENTIALLY, IT'S JUST A RECITATION OF THE JURY VERDICT, AND THAT'S WHAT THE, JUDGMENT IS. BUT IF I DON'T HEAR ANYTHING FROM ANYBODY, I WILL SIGN IT.

MR. RICHMAN: VERY WELL.

THE COURT: THANK YOU, GENTLEMEN. IT'S BEEN A PLEASURE SEEING YOU TWICE.

(WHEREUPON, PROCEEDINGS WERE CONCLUDED)

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPARTMENT NO. 17
HON. RICHARD P. KALUSTIAN, JUDGE

LIONEL SIMON, ET AL.,
PLAINTIFFS,
VS.
SAN PAOLO BANK, ET AL.,
DEFENDANTS.

BC 152431
REPORTER'S CERTIFICATE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } SS

I, GLORIA J. HALL, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1 THROUGH 2003, COMPRISES A FULL, TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HELD ON AUGUST 1, 1997; AUGUST 4, 5, 6, 7, 8, 1997; AUGUST 11, 12, 1997; OCTOBER 3, 1997; OCTOBER 22, 1997; DECEMBER 9, 1997; FEBRUARY 20, 1998; MARCH 6, 1998; MARCH 9, 10, 11, 12, 13; 1998 AND APRIL 8, 1998 IN THE MATTER OF THE ABOVE-ENTITLED CAUSE.

DATED THIS 11TH DAY OF AUGUST, 1998.

/s/ GLORIA J. HALL
OFFICIAL REPORTER #4165

Supreme Court, U.S.
FILED
JUN 14 2002
OFFICE OF THE CLERK

No. 01-1722

IN THE

Supreme Court of the United States

SAN PAOLO U.S. HOLDING COMPANY, INC.,

Petitioner,

v.

LIONEL SIMON d.b.a. LIBERTY PAPER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION FOUR

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Whether certiorari is appropriate to review the factual basis for the juries' verdicts and the Court of Appeal's conclusions after conducting a de novo review of the due process challenge to the punitive damage award?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are respondent, Lionel Simon, doing business as Liberty Paper Company. Liberty Paper Company is a trade name for Lionel Simon and Petitioner, San Paolo U.S. Holding Co. Inc., a Delaware corporation.

RULE 29.6 STATEMENT

Rule 29.6 is inapplicable, because respondent Lionel Simon is an individual.

TABLE OF CONTENTS

	Page
Counter-Statement of Questions Presented	i
Parties to the Proceedings	ii
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	5
Statement of Factual Background	5
Statement of Procedural Background	12
Reasons for Denying the Writ	14
A. Certiorari Is Not Warranted Because Cooper Did Not Require De Novo Review of the Juries' Factual Findings Or The Conclusions Reached By The Court Of Appeal	14
B. Certiorari Is Not Warranted Because San Paolo's Petition Does Not Establish Compliance with Supreme Court Rule 10 ..	18
C. Certiorari Is Not Warranted Merely Because the State Appellate Court Also Applied California's Passion and Prejudice Standard to the Award	19
Conclusion	21

TABLE OF CITED AUTHORITIES

Page

Cases:

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) 1, 3, 15, 17, 19, 21

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) ..... *passim*

Haslip v. Pacific Mutual Ins. Co., 499 U.S. 1 (1991) 19

Las Palmas Associates v. Las Palmas Center Associates, 235 Cal. App. 3d 1220, 1 Cal. Rptr. 2d 301 (1991) 19, 20

Neibel v. Trans World Assur. Co., 108 F.3d 1123 (9th Cir. 1997) 17

Statute:

California Penal Code Section 182(a) 17

California Penal Code Section 484(a) 17

Rules:

United States Supreme Court Rule 10 ..... 5, 18

United States Supreme Court Rule 10(b) 18

United States Supreme Court Rule 10(c) 18

Plaintiff/Respondent Lionel Simon d.b.a. Liberty Paper Company ("Simon") respectfully submits this brief in opposition to the petition for Writ of Certiorari filed by defendant and petitioner San Paolo U.S. Holding Company, Inc. ("San Paolo"), in which it is seeking review of the California Court of Appeal's unpublished decision in *Simon v. San Paolo*, case number B121917 (California Court of Appeal, November 7, 2001).

San Paolo is a disgruntled litigant who twice lost at the trial court, California Court of Appeal and California Supreme Court. San Paolo was also denied a stay of execution on the judgment by this honorable Court even though this Court also granted review without hearing or briefing, vacated the appellate court judgment, and remanded the case for consideration in light of the standard of review set forth in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

This case has an unusual factual and procedural history and is a terrible candidate for setting precedent. The review process of the California Court of Appeal was performed exactly as this Court suggested, reviewing the factual record supporting the verdict to determine if it was "clearly erroneous" and conducting a de novo review of the due process analysis articulated by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

In a misleading and self serving manner, San Paolo wrongly asserts that the California Court of Appeal did not properly apply the standard of review set forth in *Cooper* even though the Court of Appeal specifically stated it was doing so and discussed the process in the written opinion on six occasions. The Court of Appeal stated it was applying a

de novo or independent review at pp. 2, 7, 16, 17, 25 and 27 of the November 7, 2001, opinion. San Paolo attempts to rewrite the appellate review process by asserting that this Court mandated, in essence, a retrial of the lawsuit before the appellate court whenever a constitutional challenge is made to a punitive damage award. Contrary to San Paolo's arguments, this Court never imposed such an onerous task on the appellate system.

Appellate courts do not handle the functions of the trial court. Indeed, appellate courts are at a disadvantage with respect to the determining the facts supporting the underlying tort claims or the degree of reprehensibility of the wrongdoer's actions because they are only reviewing the cold record without the opportunity to consider the demeanor of witnesses. *See generally*, *Cooper*, *supra*, 532 U.S. at 440. Certainly, the trial judge is in the best position to perform that task, particularly when the trial court, as it did in this case, ruled on a motion for new trial. Wholesale discounting of the jury's findings could result in a violation of the Seventh Amendment's Reexamination Clause. Determining questions of fact before and after *Cooper* remain with the trial court. As this Court stated in *Cooper*, *supra*, 532 U.S. at 440 n.14:

> While we have determined that the Court of Appeals must review the District Court's application of the *Gore* test *de novo*, it of course remains true that Court of Appeals should **defer** to the District Court's findings of fact unless they are clearly erroneous. (Citations omitted and emphasis added.)

The appellate court's role is to review the factual findings of the trial court, whether implied or express, under the "clearly

erroneous" standard and to apply those facts "de novo" to the three pronged test enunciated in *Gore*. It is a de novo review of the *Gore* factors not a de novo review of the facts supporting the judgement. In its November 7, 2001, opinion, the California Court of Appeal recognized this important distinction stating:

> Our original judgment, entered on August 28, 2000, was vacated by the United States Supreme Court on May 29, 2001, and the cause was remanded to determine de novo whether the award of punitive damages violated the defendant's right to due process under the federal Constitution. **We have now reconsidered the matter, applying a de novo standard of review to the due process issue**, and we again affirm the judgment. (Emphasis Added.)

(Pet. A-2)[1]

The appellate court correctly applied the de novo standard **to the due process issue** and not to the findings of fact. San Paolo argues, as it must since their conduct was so egregious, that the facts supporting the verdict should have been decided differently, but the court ignored their arguments.[2] *Cooper* did not require the reviewing court to

1. All references to "Pet." are to the Appendix attached to the Petition.

2. A substantial portion of San Paolo's petition is devoted to comparing the appellate court's first opinion with the second suggesting that the appellate court ignored this Court's requirement to conduct a de novo review because the written decision appears to

(Cont'd)

disregard the facts. San Paolo can not change the facts in this matter. The Court of Appeal understood this distinction:

> In its supplemental brief after remand, San Paolo seems to suggest that the de novo review of constitutional issues mandated by the Supreme Court requires a de novo resolution of conflicting factual issues. We disagree. Although the Court held that we must determine the constitutionality of a punitive damage award under a de novo standard of review, it explained . . . that reviewing courts must independently apply a constitutional standard to the facts of the trial court unless they are "clearly erroneous."

(Citation to *Cooper*, *supra*, n.14 and citations omitted).

> Here, the trial court made no factual findings of its own, and by denying the motion for new trial, the trial court did not disturb any of the jury's factual findings. Thus, for the purpose of our review of the due process issues, we shall apply the *Leatherman* standard to the express and implied factual findings of the jury, and reject them only if they are clearly erroneous.

(Pet. A-7-8.)

(Cont'd)

be similar to the original opinion. San Paolo seems to ignore the fact that both San Paolo's appeal **and** Simon's cross-appeal raised other issues which were not affected by the Court's "GVR" Order. Thus, it is not surprising that the appellate court would repeat the facts upon which it based its decision and the analysis from its initial review.

San Paolo contends that the Court of Appeal either did not correctly apply the standard in this case or that the Court of Appeal's factual conclusions were erroneous. At best, therefore, San Paolo is arguing that the Court of Appeal's conclusions were not correct. Disagreements with appellate court conclusions are rarely the subject of United States Supreme Court review, particularly where the rule of law was properly stated.

As stated in Rule 10 of the Rules of the Supreme Court of the United States: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." San Paolo's asserted error is nothing more that an allegation of "erroneous factual findings or the misapplication of a properly stated rule of law."

Moreover, this case presents no authentic conflict of law, no unsettled question regarding due process and no new Constitutional issues for this Court to address. Accordingly, there is no basis for review and costs should be awarded to Simon.

STATEMENT OF THE CASE

Statement of Factual Background

In the evening of June 12, 1996, San Paolo and Simon executed an agreement titled "Letter of Intent" (the "Agreement") whereby Simon and San Paolo agreed that all essential terms were agreed to and that the parties could then complete a sale of the Property. (Joint Appendix In Lieu of Clerk's Transcript "JA" 1864-1871.) Simon testified that he had waited patiently for almost *two* years to buy the Property and it was perfectly and *uniquely* suited for his business

operations and it would generate rental income. (RT 31-34, 1229, 1231-1235; SJA 2424.) Simon was told by the broker that the Agreement was a binding contract and that it was the fastest way to get San Paolo into escrow because of the very short escrow period of about two weeks. (RT 69; SJA 2271-2273.) Contrary to San Paolo's claim, the Agreement did not contain any express statement that it was nonbinding. (SJA 2274-2281.) Simon testified and introduced evidence that the Letter of Intent was originally drafted with an express statement that it was binding but was later *fraudulently* altered to remove the express statement. (RT 68-70; SJA 2271-2273.)

The Agreement stated it contained the "essential elements of this transaction and that any minor modifications or further instructions shall be identified and reflected in the escrow instructions." (SJA 2274-2281.) Paragraph M of the Agreement stated that "*Seller and Buyer agree to exclusively negotiate upon execution of this letter.*" (SJA 2280.) William Atha ("Atha"), the listing agent for San Paolo and the broker on the sale, testified that the exclusive provision was to prevent the parties from negotiating with anyone else during the exclusive period and that Simon wanted the provision to ward off competing offers. (RT 240-241.) At trial, San Paolo's officers, Duane King ("King") and William Schack ("Schack"), admitted that they were bound by paragraph "M" and not permitted to negotiate with any buyer other than Simon during the "exclusive period." (RT 355, 486-487, 1434-1435, 1441-1443.)

In addition, during the first trial, each party's expert witness, regarding Letters of Intent, testified that parties are bound by exclusive negotiation clauses. (RT 594-596; 804-805.)

In reliance on the Agreement and the promises contained therein, Simon hired Donald Mitchell, a lawyer, to whom he paid a nonrefundable retainer of $5,000, and began his efforts

to close the transaction. (RT 82-82, 104-105; SJA 2350.) Simon also hired an inspection company and arranged for financing. (RT 93, 106-112; SJA 2293.) Simon testified he was ready, willing, able and eager to close the deal. (RT 65-67, 81-83, 88.) Atha, the broker, also agreed that Simon was committed to closing the transaction. (RT 217, 219 and 228.) Simon had all of the required documents ready to be delivered to King, but King, through Atha, expressly told him that he would refuse any delivery. (RT 1252-1253, 1356, 1392-1393.)

The next morning, June 13, King demanded that Simon shorten his due diligence period and release his deposit from the agreed date of Wednesday June 26 to Friday June 21. Simon agreed to move the period to Monday June 24, which was only one business day from San Paolo's date of the 21st (a weekend intervened) but required the weekend to complete his due diligence on such a short escrow. When Simon demanded that escrow open, King turned the dispute against Simon by asserting that Simon was refusing to perform and thereafter at approximately 5:00 p.m. on the 13th, rather than continue to resolve this issue to complete the transaction as they were bound to do in good faith, King terminated the deal. (RT 1257-1258.) At the time of these events, San Paolo's agent, Atha, wrote that San Paolo's position was unreasonable. (RT 1345-1347.) He stated as follows:

> [I]t seems that the bank's position of requiring funding no later than the 21st is unreasonable. Buyer has moved forward in 'good and, better faith'.

(RT 1346-1347.) The evidence established that San Paolo had no valid reason to insist that the deposit be released on the 21st, rather than on the 26th. For reasons which became

clear later, King never sought approval of the 24th. Further, notwithstanding that escrow was scheduled to open only hours later, King and Schack conceded San Paolo never prepared any memoranda seeking approval of Simon's transaction from their New York office as they were required to do by the Agreement and as was their custom and practice. The evidence established that New York approval of the transaction in writing was never sought. (RT 397-398, 1455-1456, 1461-1462, 1605-1609 and 1614; SJA 2275.)

The evidence demonstrated that, during the exclusive negotiation period, San Paolo wrongfully continued to negotiate the sale of Property with another buyer, 816 Partners, L.L.C. ("816 Partners") who were represented by Robert DeVogelaere ("DeVogelaere"), a broker and a managing member of 816 Partners. (RT 523-525, 534.) The evidence demonstrated that on June 12th, 816 Partners prepared a written offer to purchase and delivered it to King. On June 13th, it was signed by King on behalf of San Paolo. King signed it before he had terminated Simon's right to be exclusively negotiating to buy the Property. (JA 1901-1916.) Thereafter, King began his pre-textual renegotiation with Simon in order to discourage him from attempting to close the deal. At approximately 5:00 p.m. on June 13, 1996, King terminated the Agreement. (RT 102, 364-367, 1254, 1263-1264, 1267-1268, 1344-1347, 1459-1461, 1616; SJA 2315-2316.)

After Simon filed suit on June 21, and recorded a lis pendens, San Paolo immediately filed a motion to expunge. San Paolo submitted several declarations under oath for use at the hearing. Both King's and DeVogelaere's declaration admitted to the enforceability of the exclusivity provision but *fraudulently* stated that it was not violated.

DeVogelaere's declaration stated that, because King *had advised* him that he was exclusively negotiating with Simon, they could not discuss the sale of the Property. DeVogelaere stated, under oath, that he did not call King until June 14, after Simon's deal was terminated. The declaration of DeVogelaere also stated that his negotiations with San Paolo did not take place until the late afternoon of June 14 conveniently after Simon's Agreement was supposedly terminated. (RT 538-542, 568-569, 1558-1559.) As explained below, DeVogelaere later admitted that his declaration false.

King's declaration stated that they neither met nor communicated with each other during the exclusive period. (RT 373-375, 464-465, 538-542, 1436-1438, 1512-1513, 1558-1559.) King stated that he first met with DeVogelaere on June 14, 1996 when they signed their agreement. (*Ibid.*) This declaration was also intentionally false. The trial court relied on these false declarations and expunged the lis pendens. (RT 373-375, 464-465, 538-542, 1271-1272, 1435-1438, 1512-1513, 1558-1559.)

At trial, San Paolo's scam unraveled. Both King and DeVogelaere conceded that their declarations were false. Simon introduced both King's and DeVogelaere's telephone records which documented a multitude of calls between DeVogelaere and King immediately prior to the execution of Simon's Agreement and thirteen (13) telephone calls during the exclusive negotiation period. (RT 377-382, 464-465, 534-542, 568-569, 1435-1439, 1508-1509, 1511-1512, 1554-1555.) DeVogelaere admitted that he was discussing the acquisition of the Property. (RT 508, 527, 534-542, 568-569, 1550, 1554-1555.)

San Paolo also enlisted the assistance of the broker, Atha, to *conceal* King's repudiation of the exclusive negotiation clause. Atha's testimony and notes reflect that he was instructed by King, between 1:30 p.m. and 3:30 p.m, on June 13, 1996, during the exclusive negotiating period, not to advise Simon that King was violating his promise to exclusively negotiate. Atha wrote in his notes:

> Do not tell him — Lionel — that Duane is talking to any other deal in building —

(RT 242, 244-245, 1350, 1352; SJA 2353.)

DeVogelaere further testified that his declaration was prepared by San Paolo's counsel. (RT 542, 1558-1560.) DeVogelaere further admitted, contrary to the declaration, that King never told him that he was bound to exclusively negotiate with Simon and, thus, continued to inquire about buying the Property. DeVogelaere also admitted that the date of his meeting with King was falsely stated in his declaration; it took place on June 13, not in the late afternoon of June 14. (RT 538-542, 568-569, 1558-1559.)

King was also shown to have lied about when and how he executed the 816 Partner's Agreement.

Escrow records for the 816 Partners' sale were also introduced into evidence. These records revealed that "extra money" was placed into escrow, beyond the proceeds necessary for the actual sale. The only version of the escrow closing statement produced to Simon reflected that $69,248.38 was overpaid into escrow by the buyer's lender. (SJA 2351.) A letter to the escrow company, prepared by San Paolo's attorneys, discussed apparently a different version of the closing statement where as much as $95,000 was overpaid into escrow by the buyer. (RT 1462-1464.) No evidence was introduced to explain

the reason why counsel wrote the letter or why the irregularity existed, except that the "extra money" supposedly went back to the buyer. DeVogelaere, who at least initially received the money, testified that having the extra money in escrow was indeed "very uncommon." (RT 1586.)

San Paolo's tangled web of deception did not end, however, when 816 Partners entered escrow on June 14. Three days later, on Monday, June 17, 1996, King, fearing that Simon might file suit to block the sale, instructed Atha to renew their negotiations with Simon. At King's behest, Atha called Simon several times during that week, providing Simon with updates on King's efforts to get approval for their renewed deal from New York and Italy, where the parent company was located. San Paolo's transparent intent was to forestall Simon from filing suit, and blocking the sale of the Property, which was originally scheduled to close on June 20. (RT 227, 249-256, 1344-1346, 1353-1356, 1388-1389, 1392-1393; SJA 2323-2330.) Simon, now sensing that another sale was about to close, and that he was being defrauded, filed suit on June 21, 1996. He also recorded a lis pendens temporarily blocking the sale.

Simon testified that, as a result of the misconduct of San Paolo, he was deprived of this very unique five-story property that was specially situated and perfect for his business of selling paper products and printing to local offices. Simon testified he intended to use only a portion of the building to house his own business. The remainder would be leased to commercial tenants. (RT 31-33, 1229, 1231-1235.) The improvements to the upper floors were of high quality. The Property was unique in that it was the only five-story building that would ever be likely to come on the market in the financial district of downtown where the other office buildings are skyscrapers. Indeed, this was truly a once in a lifetime opportunity for a small businessman like Simon who had followed the sale of the property for two years.

Simon's appraisal expert, David M. Rosenthal, MAI, testified that the market value of the Property was $1.5 million as of June 13, 1996. Simon's offer was for $1.1 million, thus reflecting a *lost profit of $400,000*. (RT 1678, 1703, 1710-1711, 1734; SJA 2274-2281.)

As to San Paolo's wealth, their financial statements demonstrated that the company had estimated net assets at liquidation value of approximately $50 million at the first trial. (SJA 2425-2436.)

Statement of Procedural Background

On June 21, 1996, Simon filed his complaint against San Paolo. The complaint included causes of action for False Promise, Breach of Contract, Specific Performance, and Breach of the Implied Covenant of Good Faith and Fair Dealing. (JA 1-18.) A lis pendens recorded against the Property was expunged on July 23, 1996. The only two causes of action which went to trial were the theories of False Promise and Breach of Contract. The first trial resulted in a verdict in favor of Simon on the claim for false promise, the jury finding that:

(1) San Paolo made a false promise about a material matter to Simon, i.e., promise to exclusively negotiate with Simon to complete a sale; (2) San Paolo did not intend to perform the promise at the time it was made; (3) San Paolo made the promise with an intent to defraud Simon; (4) At the time San Paolo made the promise, Simon was not aware of its intention not to perform; (5) Simon acted in reliance on the promise; (6) Simon was reasonably justified in relying on the promise; (7) San Paolo's promise caused Simon damage, and that such damage was $5,000; (8) That there

was clear and convincing evidence that San Paolo committed malice, oppression or fraud in the conduct on which the jury based its finding of liability for false promise. (JA 615-617.) Simon asserted that the harm caused by San Paolo far exceeded the $5,000 and included the lost value of the Property.

The jury also decided that punitive damages should be assessed against San Paolo and determined this figure to be $2,500,000. (JA 618.)

San Paolo filed its motions for a judgment notwithstanding the verdict and for a new trial, or, in the alternative, for a remittitur on August 21, 1997. (JA 619-776, 1050.) The trial court granted the motion for new trial unless Simon consented to a reduced damage award of $250,000. (JA 1228.) Simon rejected the remittitur and elected to proceed to a second trial. (JA 1269-1271.)

On March 9, 1998, the new trial went forward on the issue of the amount of punitive damages to be awarded. The *second jury to hear this case* returned a verdict of $1,700,000 in punitive damages against San Paolo. (JA 1817-1825.) After the conclusion of the second trial, San Paolo again filed a motion for new trial, or, alternatively for a remittitur, which the trial court denied. (JA 1518-1667; RT 1994-2003.) Under California law, on a motion for new trial, the trial judge conducts a de novo review of the evidence. (Cal. Code Civ. Proc. § 657.)

San Paolo's appeal, and Simon's protective cross-appeal followed this ruling. (JA 1829-1834, 1851-1853.) The Court of Appeal affirmed the award of punitive damages in an unpublished opinion which was filed on August 28, 2000. San Paolo filed a petition for rehearing which was denied by

the Court of Appeal. San Paolo filed a petition for review to the California Supreme Court, which was denied en banc on December 13, 2000.

On May 29, 2001, this Court granted review, vacated the appellate court opinion and remanded without argument directing the appellate court to reconsider the decision in light of this Court's decision in *Cooper*, *supra*[3]. On remand, the California Court of Appeal received further briefing on the impact of *Cooper*, *supra*, and oral argument was held. On November 7, 2001, the California Court of Appeal issued its second unpublished decision affirming the trial court verdict. A subsequent Petition for Review to the California Supreme Court was denied. This Petition followed.

REASONS FOR DENYING THE WRIT

A. Certiorari Is Not Warranted Because Cooper Did Not Require De Novo Review of the Juries' Factual Findings Or The Conclusions Reached By The Court Of Appeal

San Paolo argues that the application of a deferential standard of review to the factual findings is contrary to this Court's decision in *Cooper*. San Paolo misconstrues this Court's holding in *Cooper*. San Paolo argues that the appellate court was ordered to conduct a de novo review of the evidence. San Paolo is clearly wrong. Appellate courts apply deferential standards to factual findings in varying degrees (substantial evidence, abuse of discretion, clearly erroneous, etc.). *Cooper* held that factual findings are to be upheld unless "clearly

3. San Paolo's request that this Court stay Simon's execution on the judgment pending its determination of the merits of the first Petition was denied by this Court. Simon has received payment on the judgment and filed a satisfaction of judgment with the Los Angeles Superior Court.

erroneous." *Id.* at 440 n.14. This process is consistent with the Court's requirement that the reviewing court not defer to the trial court as to the **amount** of the punitive damage award. That process was preserved by the Court of Appeal in this case.

De novo review **of the findings of facts to the due process analysis** was applied in this case. The Court of Appeal stated it was applying a de novo or independent review at pp. 2, 7, 16, 17, 25 and 27 of the November 7, 2001, opinion. San Paolo was not denied due process as the Court of Appeal applied the facts as found by the trial court "de novo" to the *Gore* factors before independently concluding that the amount was within constitutional limits. Beginning at page "A-16" of the opinion, the Court examines the verdict in light of *Gore.* In doing so, the appellate court stated :

> Discussing only evidence favorable to its position, San Paolo contends that its conduct was not "particularly reprehensible," because it caused only 'nominal' economic harm and was a single act. Further, it contends that by the time of trial King was no longer employed by San Paolo, thus such conduct was unlikely to recur. **Our review of all of the evidence leads us to the opposite conclusion.** We do not agree with San Paolo's characterization of its wrong as "just a business deal gone awry." "Trickery and deceit" are reprehensible wrongs, especially when done intentionally through affirmative acts of misconduct. (Citations omitted) **We have no difficulty in independently concluding that the conduct of San Paolo's officer was reprehensible and that punitive damages were warranted in this case.** (Emphasis Added.)

(Pet. A-16-17.)

The Court of Appeal further found that King's fraudulent conduct was "continuous and intricate." (Pet. A-17.) King "filed two false declarations." (Pet. A-17.) "Lying to the trial court about the wrongful conduct may be considered in measuring reprehensibility." (Pet. A-19.) "Concealment of evidence of fraudulent intent is reprehensible . . ." (Pet. A-19.) "King's deception at trial served to demonstrate just how false he was prior to trial, and thus, how reprehensible his conduct was." (Pet. 1-19.) Further, in reviewing the evidence to support San Paolo's assertion that this will never happen again, the Court of Appeal rejected the notion finding:

> San Paolo did not terminate Kings employment, or distance itself in any way from King's conduct. King was never reprimanded, warned, or counseled; he suffered no job or salary action whatsoever, and even got a bonus that year. It is far from certain that San Paolo will change its policies to discourage similar conduct in the future.

(Pet. A-19.)

These findings demonstrate that the Court of Appeal reviewed the facts to determine if they were clearly erroneous.

The Court of Appeal also reviewed de novo the ratio of punitive damages to total harm suffered by Simon. (Pet. A-19-23.) The Court found that the correct ratio based on its review of the evidence (there was no express or implied finding on this point by the jury) was just over 4 to 1, rejecting San Paolo's 340 to 1 analysis. The Court of Appeal found that the amount of financial harm suffered by Simon was at least $400,000. This specific finding was that of the appellate

court not the jury. This number was inferred by the Court of Appeal from its independent review of the evidence.

The third factor set forth in *Gore* of the difference between punitive damages and civil and criminal penalties was also reviewed de novo. Interestingly, the Court of Appeal noted that San Paolo never addressed this factor in its opening brief on appeal and then objected to Simon's comparisons to civil penalties in deceptive trade practice and perjury cases. (Pet. A-24.) The Court of Appeal found that San Paolo had fair notice of the consequences of its fraud by comparing the penalty of imprisonment for committing a felony such as those set forth in California Penal Code Sections 182(a) and 484(a), which govern the crimes of conspiring "to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises" and "knowingly and designedly, by any false or fraudulent representation or pretense, defraud[ing] any other person of money . . ." *Neibel v. Trans World Assur. Co.*, 108 F.3d 1123, 1131 (9th Cir. 1997) (Under California law a party has fair notice that substantial punitive damages could be awarded, comparing the civil remedy with felony convictions based on fraud.) (Pet. A-24-25.)

The Court of Appeal found that "[its task] has been to determine de novo whether the award is so grossly disproportional to the gravity of the wrong as to violate due process. (Citation to *Cooper* Omitted.) Having undertaken such a review, we conclude that it was not." (Pet. A-25.) Accordingly, it is clear that a thorough and comprehensive analysis was performed by the Court of Appeal.

B. Certiorari Is Not Warranted Because San Paolo's Petition Does Not Establish Compliance with Supreme Court Rule 10

San Paolo has also not established compliance with any of the written considerations governing Supreme Court review as specified in Supreme Court Rule 10(b) or 10(c). These sections provide that "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeal" and that "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." San Paolo has merely repeated constitutional buzzwords without substance. San Paolo fails to adequately describe or explain how or in what manner the state appellate court's decision decides an important federal question or how it conflicts with any other court's decision. San Paolo's claim that other jurisdictions are wrestling with the application of *Cooper* is not true. The cases cited by San Paolo simply discuss punitive damages and in some cases *Cooper*, but do not create conflicting applications of the rule. There is literally no showing of any practical and real significance to the alleged conflict created by the California Court of Appeal decision in this case. Simon asserts that these hollow pronouncements by San Paolo justify a denial of review.

This is merely a case brought by a disgruntled litigant in a fact specific determination that affects only the litigants to this action. San Paolo's professed desire to settle important procedural issues of law is disingenuous.

C. Certiorari Is Not Warranted Merely Because the State Appellate Court Also Applied California's Passion and Prejudice Standard to the Award

San Paolo also raises an objection to the Court of Appeal's analysis of the award in light of California's "passion and prejudice" standard for controlling excessive awards. This argument is irrelevant because the court's analysis was in addition to, not in lieu of its analysis of the *Gore* factors. In this case the award satisfied both standards.

In raising this argument, San Paolo incorrectly states that because one lower state court described the "passion and prejudice" test as a species of the substantial evidence test, it violates due process. California's "passion and prejudice" test offers the same level of deferential review to the findings of fact as *Cooper* with respect to its "clearly erroneous" standard but independent consideration of the actual award. San Paolo confuses the determination of fact with the examination and evaluation of the *amount* of damages awarded. The California Court of Appeal previously addressed the unique role that the "passion and prejudice" standard has in examining punitive damage awards. The "passion and prejudice" test is considered an "additional safeguard" to ensure that the jury's award has not exceeded constitutional limits. *Las Palmas Associates v. Las Palmas Center Associates*, 235 Cal. App. 3d 1220, 1257-59, 1 Cal. Rptr. 2d 301 (1991). In *Las Palmas*, the court held that the degree of review afforded by the "passion and prejudice" test at the trial and appellate level satisfies federal due process concerns, citing to the United States Supreme Court decision in *Haslip v. Pacific Mutual Ins. Co.*, 499 U.S. 1 (1991).

At the trial court level, the judge sits as an independent trier of fact and evaluates the demeanor and credibility of the witnesses and weighs the evidence. (*Id.* at 1258.) At the appellate level this standard places responsibility on the court to "intervene when the verdict is so palpably excessive to raise the presumption of passion and prejudice." (*Id.* at 1258.) Applying this standard, the *Las Palmas* court stated:

> Application of the "passion and prejudice" standard does not occur in a vacuum, but is measured against the identical criteria utilized by the jury: reprehensibility of defendant's misdeeds, the ratio between the compensatory and punitive damages, and the relationship between the punitive damages and defendant's net worth. [Citations.]

Id. at 1258. Thus, it affords the appellate court the opportunity for a de novo review. The *Las Palmas* court concluded by noting:

> [This] quantum of critical evaluation thus makes certain that punitive damage verdicts will be limited to that amount of money necessary to accomplish the public policy of punishment and deterrence. In sum, the "passion and prejudice" test affords in posttrial proceedings and on appeal the same general degree of scrutiny as found in the Alabama review process [referring to *Haslip*, *supra*].

Id. at 1258.

It is clear, therefore, that California's "passion and prejudice" test is for all practical purposes a species of de novo appellate review, similar to that required by *this Court in Cooper*. The practical application of the "passion and prejudice" standard will, in all cases, result in an independent review for the defendant.

As mentioned previously, San Paolo's argument regarding the California "passion and prejudice" test is irrelevant because the Court of Appeal conducted a de novo review of the due process challenge to the punitive damage award utilizing the *Gore* factors (reprehensibility, ratio, and comparison to civil and criminal fines).

CONCLUSION

For all of the foregoing reasons, respondent respectfully requests that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 01-1722

IN THE

Supreme Court of the United States

SAN PAOLO U.S. HOLDING COMPANY, INC.,
Petitioner,

vs.

LIONEL SIMON, dba LIBERTY PAPER COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FOUR

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Ace v. Aetna Life Ins. Co.,
40 F.Supp.2d 1125 (D. Alaska 1999) 10

BMW of North America v. Gore,
517 U.S. 559 (1996) 2, 5, 9

BMW of North America v. Gore,
701 So.2d 507(Ala. 1997) 9

Campbell v. State Farm Mut. Auto Ins. Co.,
432 Utah Adv. Rep. 44, 2001 WL 1246676
(October 19, 2001), *cert. granted*,
122 S.Ct. 2326 (June 3, 2002) 6

Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,
532 U.S. 424, 121 S.Ct. 1678 (2001) ..... *passim*

Fortman v. Hemco, Inc.,
211 Cal.App.3d 241 (1989) 3

San Paolo U.S. Holding Company, Inc. v. Simon,
532 U.S. 1050, 121 S.Ct. 2190 (Mem) (2001) 3

Williams v. Philip Morris Inc.,
48 P.3d 824 (Ore. 2002) 7, 8

Page

Statutes and Rules

California Code of Civil Procedure
§ 657 4

Supreme Court Rule 10(c) 10

Secondary Authorities

Junping Han, *The Constitutionality of Oregon's Split-Recovery Punitive Damages Statute*, 38 Willamette L. Rev. 477 (Summer 2002) 8

In support of its Petition for Writ of Certiorari (the "Petition"), Petitioner San Paolo U.S. Holding Company, Inc. ("San Paolo"), hereby responds to the Brief in Opposition (the "Opposition Brief") filed by Respondent Lionel Simon, dba Liberty Paper Company ("Simon"), as follows:

INTRODUCTION

In the Petition, San Paolo presents for this Honorable Court's review five sharply focused questions of wide-ranging importance to civil litigants and courts throughout the Nation. In his Opposition Brief, Simon instead focuses on his own inflammatory, revisionist description of the facts of this case in an attempt to divert this Court's attention from these issues of paramount public interest and concern. Simon fails to address or reconcile the admissions of the Court of Appeal and the trial court that they were deferring to the jury in sustaining the punitive damage award to Simon in an amount 340 times greater than the actual damages or harm suffered.

Simon also incorrectly interprets *Cooper Industries, Inc. v. Leatherman Tool Group, Inc. ("Cooper Industries")*, 532 U.S. 424, 121 S.Ct. 1678 (2001), relying primarily on one footnote[1] in an effort to gloss over the significance of the need for this Court to provide guidance as to how the constitutional standard of review should be applied in this and similar cases. Simon further admits that the Court of Appeal employed the deferential "passion and prejudice" standard in affirming the punitive damage award and ignores the issue of whether a defendant's wealth should even be considered when assessing the constitutional propriety of a punitive damage award.

---

[1] *Cooper Industries*, 121 S.Ct. at 1688, n. 14.

Simon also ignores the failure of the Court of Appeal to honor the Order of this Court herein, vacating the Court of Appeal's prior decision and ordering it to review this case in light of *Cooper Industries*, i.e., pursuant to the new, heightened independent standard of review. Simon also fails to address the differing methods of applying this new standard among the States. Similar to the error committed by the Court of Appeal below, Simon's interpretation of the facts is one-sided and ignores the facts in favor of San Paolo. This approach is problematic *ab initio*, in that it preordains the same result as that reached by the trial court and reduces the standard of "independent review" to little more than the payment of lip service to San Paolo's constitutional rights. It is this defective approach which is adopted and employed by the Court of Appeal in the Second Opinion.[2]

Contrary to Simon's unsupported argument, appellate courts do "handle the functions of trial courts" when applying an independent review standard to a punitive damage award challenged as constitutionally excessive. Reflecting the same confusion of the Court of Appeal in its decision, Simon argues that San Paolo is essentially trying to upset the factual findings of the trial court. The truth is that San Paolo is challenging the Court of Appeal's repeated deferential review of the record and wholesale adoption of Simon's argument in an effort to affirm the award – instead of independently reviewing the actual (versus implied) factual findings of the jury and applying them to the three factors set forth in *BMW of North America v. Gore ("BMW")*, 517 U.S. 559 (1996), for determining whether San Paolo's constitutional rights have been violated.

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[2] Unless stated otherwise, capitalized words have been defined in the Petition.

ARGUMENT

In his Opposition Brief, Simon fails to address the merits of the significant issues raised in the Petition and instead relies on various boilerplate, conclusory arguments in an effort to detract from these important issues. For example, the fact that the Opinion of the California Court of Appeal is "unpublished" only highlights the urgent need for guidance from this Court as to the correct method for implementing the independent standard of appellate review of the constitutional excessiveness of punitive damage awards set forth in *Cooper Industries*. Beyond the published decisions addressed in the Petition, there are undoubtedly numerous decisions regularly issued by state courts throughout this land on this issue, many continuing to apply an unduly deferential standard of review in a manner rendering the constitutional standard required by *Cooper Industries* meaningless. Moreover, in the prior Petition filed by San Paolo and granted by this Court, the Opinion of the Court of Appeal was similarly unpublished. *San Paolo U.S. Holding Company, Inc. v. Simon*, 532 U.S. 1050, 121 S.Ct. 2190 (Mem) (2001).[3]

Simon acknowledges that the Court of Appeal analyzed the punitive damage award under a "passion and prejudice" standard of review. (See Opposition Brief, p. 19.) In applying this deferential (substantial evidence) standard, however, "[t]he reviewing court *does not act de novo*." *Fortman v. Hemco, Inc.*, 211 Cal.App.3d 241, 259 (1989). (Emphasis added.) Nonetheless, Simon puzzlingly argues that the application of this deferential standard somehow "will, in all cases, result in an independent review for the defendant."

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[3] The underlying decision in *Cooper Industries* was also unpublished. This in no way minimizes the importance of the issues raised by San Paolo.

(Opposition Brief, p. 21.) According to Simon, as long as the Court of Appeal invoked the *BMW* factors in reviewing the punitive damage award, its review must have been de novo.[4] This hypothesis does little more than beg the question: what is required of an appellate court in conducting an independent review of a punitive damage award under *Cooper Industries*?

To justify the Court of Appeal's deferential review of the award against San Paolo, Simon summarily dismisses the issues of federal constitutional concern raised in the Petition, claiming that "[t]his case has an unusual factual and procedural history." (Opposition Brief, p. 1.)[5] Simon, however, fails to even address the authorities discussed by San Paolo which illustrate the problems presented by the divergent, improper application of the independent standard of review by state courts throughout this country when conducting a constitutional inquiry into claims of grossly excessive punitive damage awards. (See Petition, pp. 12-14.)

The Court of Appeal admittedly failed to engage in a de

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[4] Similarly, Simon contends that, under California law, a "trial judge conducts a de novo review of the evidence" when presented with a motion for new trial. (Opposition Brief, p. 13.) Such a motion, however, *may not be granted* in this context "*unless* after weighing the evidence *the court is convinced* from the entire record, including reasonable inferences therefrom, that the court or jury *clearly should have reached a different verdict or decision.*" Cal. Code Civ. Proc., § 657; emphasis added. This standard is patently highly deferential to the verdict, in stark contrast to the independent review required by *Cooper Industries*.

[5] Simon fails to follow up on or otherwise address or support this contention with any facts or legal argument. That is because this is the perfect follow-up case to *Cooper Industries*.

novo review of the record and failed to independently examine each of the *BMW* factors in light thereof, as required by *Cooper Industries*. Simon attempts to avoid this fact by repeatedly arguing that the Court of Appeal *must have* applied the correct standard because it identifies this standard (among others) in the Second Opinion. (See, Opposition Brief, pp. 3, 5.) Instead of applying the independent standard of review pronounced by this Honorable Court, however, the Court of Appeal admittedly again relies upon a deferential presentation of the record identical to that set forth in the Prior Opinion.

Simon ignores that, in the Second Opinion, the Court of Appeal even acknowledges that it applied a substantial evidence standard and deferentially reviewed all of the trial evidence "in the light most favorable to the prevailing party, giving him the benefit of every reasonable inference, and resolving conflicts in support of the verdict." (App., A-7.)[6] Simon repeatedly confuses deference to the trial court's factual findings (unless clearly erroneous), which is not disturbed by *Cooper Industries*, with a deferential review of *the entire record in the light most favorable to the award under constitutional attack*, which flies in the face of the de novo standard of review announced in *Cooper Industries*.[7]

As Simon acknowledges, the only factual findings by the jury in this case are the following: (a) there was no binding and enforceable agreement between the parties; (b) San Paolo made a false promise about a material matter to Simon; (c) "the total amount of all damage suffered by Simon and caused

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[6] "App." refers to the Appendix to the Petition.

[7] A jury's "imposition of punitive damages is an expression of its moral condemnation," not a factual determination. *Cooper Industries*, 121 S.Ct. at 1683, 1686.

by Simon's reliance upon San Paolo's promise" was $5,000.00[8]; and (d) San Paolo committed oppression, malice or fraud in connection with the false promise. (App. Vol. III, 613-617.)[9] These are the only facts to which deference must be afforded. Simon, however, refers to an unidentified set of "facts supporting the judgement (sic)" or "verdict" which, he claims, cannot be subjected to independent review on appeal. (Opposition Brief, p. 3.) These "facts" are nothing more than his one-sided presentation of the case (to which the Court of Appeal deferred) and the various "implied" factual findings relied upon by the Court of Appeal to support the award.

The Court of Appeal strained to affirm the punitive damage award based upon its so-called *"implied factual findings* of the jury." (App., A-8.) (Emphasis added.) The court also pronounced its intent to "summarize the evidence

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[8] The first jury refused to award Simon any damages for his alleged loss of profit of $400,000.00 due to his inability to purchase the subject office building.

[9] This is in stark contrast to the "twenty-eight pages of extensive findings" made by the trial court in *Campbell v. State Farm Mut. Auto Ins. Co.*, 432 Utah Adv. Rep. 44, 2001 WL 1246676, *9 (October 19, 2001), *cert. granted*, 122 S.Ct. 2326 (June 3, 2002). In *Campbell* (cited in the Petition at page 14), the jury awarded $2.6 million in compensatory damages and $145 million in punitive damages (a ratio of over 55:1), which the trial court remitted to $1 million and $25 million respectively. The Supreme Court of Utah reinstated the original punitive damage award, noting, *inter alia*, that punitive damage awards "should have a proportional relationship to the defendant's wealth" and that "State Farm is an enormous company with massive wealth," justifying the higher ratio of punitive to actual damages (145:1). *Id.* at *8, 15-16. As reflected above, this Court has granted State Farm's Petition for Writ of Certiorari.

in the *light most supportive of the verdict, for purposes of both constitutional and non-constitutional* issues." (App., A-7-8.) (Emphasis added.) This is a marked departure from *Cooper Industries*, where this Honorable Court clearly required appellate courts across the Nation (and the Court of Appeal in this case in particular) to independently review all of the evidence, not just the facts favorable to the respondent or the unsupported argument of counsel, to determine if a challenged punitive damage award is excessive. Again, it is only the factual findings of the trial court to which deference must be afforded. *Cooper Industries*, 532 U.S. at 440, n. 14.

The Court of Appeal's effort to uphold the punitive damage award based upon implied factual findings and a deferential review of the record does not stand in isolation. Recently, in *Williams v. Philip Morris Inc.*, 48 P.3d 824 (Ore. 2002), the Oregon Court of Appeals upheld a punitive damage award of $79.5 million, 97 *times greater* than the compensatory award of $821,485.80.[10] That court's application of the heightened standard of review established in *Cooper Industries* highlights the need for further guidance from this Court. Like the Court of Appeal herein, the *Williams* Court chose to "state the facts most favorably to plaintiff, drawing all reasonable inferences in her favor." *Id.* at 828. In an effort to reconcile Oregon's deferential "rational juror standard" with the new de novo review standard, the *Williams* Court concluded that, in *Cooper Industries*, this Honorable Court "recognized the jury's primary role in finding the facts relevant to an award of punitive damages . . . and in

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[10] The trial court had previously substantially reduced the punitive award from $79.5 million to $32 million on the grounds that it was excessive under the United States Constitution. *Williams*, 48 P.3d at 828.

establishing the appropriate amount." *Id.* at 837.[11]

Having rationalized the implementation of a de novo review standard which nonetheless defers to the jury, the *Williams* Court reiterated that it would "evaluate the jury's award for excessiveness" based upon a review of the relevant evidence "stating it in the light most favorable to plaintiff." *Id.* at 838. Moreover, the court imputed to the jury various factual findings supportive of the award, repeatedly invoking the term: "the jury could find," "could have found," and "could have believed." *Williams*, 48 P.3d at 839-840, 842. Having applied this patently deferential analysis to the punitive damage award, the court concluded that the trial court erred in reducing it. *Id.* at 842.

Simon fails to address this recurring inability of reviewing courts across the Nation, including the Court of Appeal herein, to properly apply the heightened standard of review set forth in *Cooper Industries*. (Petition, 12-16 & n. 8.) Without strict adherence to this new standard, runaway punitive damage awards will remain unchecked, continuing to increase in size and frequency, impairing "the credibility of the justice system," and adversely affecting "the innovation of new products and . . . the well-being of the economy as a whole. . . .[¶] Junping Han, *The Constitutionality of Oregon's Split-Recovery Punitive Damages Statute*, 38 Willamette L. Rev. 477, 492-493 (Summer 2002).

The heightened standard of review called for in *Cooper Industries*, barely one year old, is already being whittled down

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[11] The "rational juror" standard is addressed in the Petition at pages 13-14. The Oregon court directly contradicts this Court's determination that a "jury's award of punitive damages does not constitute a finding of 'fact.'" *Cooper Industries*, 121 S.Ct. at 1686.

via the implementation of a very limited and highly deferential "de novo" standard by reviewing courts. Simon passes over the Court of Appeal's conclusion that, while it "might agree with San Paolo that the award was unusually large," it felt that it was not its task "to discard the judgment of the jury in order to substitute our own"[12] and that it need only "*determine de novo whether the award is so grossly disproportional to the gravity of the wrong as to violate due process.*" (App., A-25; emphasis added.) This *perceived inability to act not only contravenes the mandate of Cooper Industries* and the Order of this Court in this case, but it abruptly deprives San Paolo and others of their constitutional protections against excessive punitive damage awards.

The Opposition Brief is also silent with regard to the role of the defendant's wealth in determining whether a punitive damage award is constitutionally excessive. The Court of Appeal determined that "the punitive damage award was not excessive on its face," since it was "less than five percent of San Paolo's net worth." (App., A-28.) A large punitive damage award, however, "should not be upheld upon judicial review merely because the defendant has the ability to pay it." *BMW of North America v. Gore*, 701 So.2d 507, 514 (Ala. 1997). A large corporation is equally entitled "to fair notice of the demands that the several States impose on the conduct of its business." *BMW*, 517 U.S. at 585. Further, reliance upon a defendant's wealth accumulated outside the jurisdiction unduly burdens interstate commerce. *Id.* "[D]ue process and comity concerns counsel restraint where a proposed award of punitive damages is based to a significant

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[12] This is precisely what the standard set forth in *Cooper Industries* requires the reviewing court to do: independently review the award of punitive damages on a de novo basis. *Cooper Industries*, 121 S.Ct. at 1685-1686.

degree on an accumulation of wealth generated outside the jurisdiction where the wrong was suffered." *Ace v. Aetna Life Ins. Co.*, 40 F.Supp.2d 1125, 1135 (D. Alaska 1999). The award of damages to Simon based upon the entirety of San Paolo's worldwide assets therefore cannot be sustained.

CONCLUSION

For these reasons, Simon's contention that the "asserted error is nothing more than an allegation of 'erroneous factual findings or the misapplication of a properly stated rule of law'" is simply false. (Opposition Brief, p. 5, *quoting* Supreme Court Rule 10.) Instead, as before, the Court of Appeal has decided important questions of federal law that remain unsettled and conflict with "relevant decisions of this Court." Supreme Court Rule 10(c). San Paolo now seeks relief from this Court to minimize the risk of continued confusion and arbitrariness in this area of the law, to restore predictability and reasonableness to this process, and to enforce constitutional limits on awards of punitive damages.

Date: July 31, 2002 Respectfully submitted,

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